

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PATRICIO JARA,)
)
Plaintiff,)
)
v.) 3:20-cv-00131
) JUDGE RICHARDSON
)
TENNESSEE STATE UNIVERSITY,)
)
Defendant.)
)
)

BEFORE THE HONORABLE ELI J. RICHARDSON, DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS

NOVEMBER 1, 2022

TRIAL VOLUME I-B of IV

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16	Black and white copy of Department	
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22	- Science - Physics, Posted:	
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24	Plaintiff Exhibit 29	142
25	Black and white copy of correspondence	
26	to Search Committee, Mathematical	
27	Sciences Department, Tennessee State	
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The above-styled cause came on to be heard at 8:45 a.m. on November 1, 2022, before the Honorable Eli J. Richardson, District Judge, when the following proceedings were had, to-wit:

THE COURT: All right. We are here for a jury trial in the case of *Patricio Jara vs. Tennessee State University*. The case number is 3:20-cv-00131. And we're going to talk about some things before we call in the jury venire. Lots of things, actually, as is necessary.

If counsel could make their appearances, please.

MR. BIGELOW: Good morning, Your Honor, Rob Bigelow for the plaintiff.

THE COURT: Good morning, Mr. Bigelow.

MR. DALTON: John Dalton with the Office of the Attorney General for defendant.

THE COURT: All right. Good morning, Mr. Dalton. So Mr. Dalton, are you aware that a motion in limine was filed this morning?

MR. DALTON: Yes. About an hour ago.

THE COURT: All right. Could I ask, Mr. Bigelow, it seems to me this issue would have been apparent by October 17th, right?

MR. BIGELOW: One would think, Your Honor, except

1 the fact is on October 17th, frankly, I was very much focused
2 on the issue that we have briefed and rebriefed and all that
3 with regards to Ms. Jackson and also with, frankly, preparing
4 for this -- preparing for this trial. It came to my
5 attention yesterday? Yesterday.

6 **THE COURT:** Mr. Bigelow, I have to say: A huge
7 problem with the defendant's witness list is something you
8 are responsible for as part of trial preparation, right? If
9 you're going to make -- this is a big motion in limine, and I
10 understand your grounds for it, believe me.

11 But I do think -- and I've tried a lot of cases
12 with -- you know. And I know that they -- trying cases,
13 right, it's very difficult, it's a crushing thing. I'm just
14 going to tell you, and I do want to make clear that I can be
15 in the shoes of trial counsel. I'm just saying that is
16 absolutely something that is not explainable by "I had other
17 things to do." It's not. It's not, not, not. And I'm going
18 to be very firm about that.

19 Now, how dispositive it is that it's not
20 explainable by "you had other things to do" is a different
21 question.

22 But I am going to say a huge problem with the -- I
23 just -- I -- you know, I don't know what to say about that.
24 Like, because the issue there, it's October 17th, there are
25 two weeks to go before trial, and a huge part of what you're

1 doing to prepare for trial is to prepare for addressing the
2 defendant's case in chief, and it can't be that you had too
3 much to do to focus on that, can it?

4 **MR. BIGELOW:** Your Honor, I agree with what you're
5 saying. Respectfully, though, I -- in the same vein, I had
6 years to prepare for this trial, years to prepare for this
7 trial. And a month ago, I found out that one of my very main
8 premises of the trial was swept out from under me. I'm not
9 saying what's good for the goose is good for the gander
10 necessarily, but I am saying, I mean, it does go -- I would
11 suggest it goes a little both ways. I mean, I've had to
12 change my entire trial strategy from -- that's lasted three
13 years, almost, within the last -- within the last --

14 **THE COURT:** Well, I do understand that. I guess
15 what I'm saying --

16 **MR. BIGELOW:** But no, you're correct. You're
17 correct, Your Honor.

18 **THE COURT:** You know, isn't it the nature of --
19 like, the thing about trials, is, and one of the reasons --
20 I'm not saying anything that counsel doesn't know, I don't
21 think. One of the things that they're difficult, trials are
22 very difficult. They're very difficult if they're done well
23 and prepared well. They're very difficult for counsel.
24 They're very difficult for the Court.

25 And so, for example, I hope counsel would agree

1 that I'm not just sitting back in this case and waiting for
2 stuff to happen. It's a roll up your sleeves, all hands on
3 deck, difficult sort of thing. And the problem is, it
4 absolutely requires doing 18 things at once. And I am
5 concerned about the timing of the motion in limine.

6 I do think -- but, you know, I think the other
7 thing is, you know, understanding how this could happen,
8 right, because it is hard and, you know, maybe you didn't do
9 everything that actually, as plaintiff that wants their day
10 in court, you're responsible for doing. But I understand,
11 you know, sometimes, people don't always do everything that
12 they should do. I do understand that.

13 But sometimes, there are consequences for not
14 doing what you should do even if it's understandable that you
15 didn't do what you should do.

16 **MR. BIGELOW:** And, Your Honor, may I also add?

17 **THE COURT:** Yes, sir.

18 **MR. BIGELOW:** The last two weeks, I have been, in
19 addition to preparing for all the rest of this trial, I have
20 been obviously trying to prepare for cross-examination of the
21 witnesses along with my client, and been digging deep into
22 the four witnesses that I mentioned. I have not ignored
23 them. In fact, I have all this stuff kind of prepared for
24 cross-examination, and I came to the realization, why don't I
25 know as much as I should about this? And how am I kind of

1 blindsided by this, and why only now am I -- and therefore, I
2 looked back and, yes, I should have done it two weeks ago.

3 But that's kind of how all this came about. I
4 looked back last night and said, oh, where have these people
5 been mentioned before, where were they? And they were not in
6 any disclosures. And is it -- is it ideal? As the Court
7 noted, of course not.

8 **THE COURT:** Well, okay. All right. Thank you for
9 the words of explanation, Mr. Bigelow.

10 Mr. Dalton, what's your take on this?

11 **MR. DALTON:** Your Honor, obviously, defendant
12 is -- had no opportunity to put together any sort of written
13 response on this given the timing of the motion as the Court
14 noted.

15 It is true that I probably should have included an
16 amendment to discovery answers because there was a question
17 about who defendant intends to call as a witness at trial,
18 and that was answered at the time. And I concede that should
19 have been supplemented, and I did not, and that's a mistake
20 on my part. That's what it is.

21 **THE COURT:** Wouldn't be the first one here, right?
22 It's gone both ways?

23 **MR. DALTON:** I wouldn't disagree with you on that.
24 That's correct.

25 I will say of the four witnesses at issue here,

1 they are going to be -- if allowed to testify, they are going
2 to offer testimony that is going to be very limited. It's
3 going to be brief and it's going to be limited. And I can
4 preview, if the Court thinks that that would be in any way
5 helpful.

6 Two of them are members or were members of the
7 search committee for the math department chair, which is a --
8 that's a main issue here, as to how that played out. And as
9 the e-mail chain showed on defendant's response on the Motion
10 to Amend and allow for deposition testimony for Dr. Jackson,
11 I did, after the problem with Dr. Jackson was revealed -- and
12 again, I passed that on to opposing counsel as soon as I
13 knew. I offered alternate members of the committee for
14 deposition at that time, and Mr. Bigelow did not want to
15 pursue that.

16 The other two members are -- or the other two
17 potential witnesses are also very limited. Dr. Reed is the
18 new interim chair of the math department, but that's only
19 been, I believe, since September of this year. That is
20 brand-new, so I didn't even know about that until very
21 recently.

22 Also, Dr. Kelly is a fellow, associate professor
23 in the math department. His testimony is going to be --
24 would be extremely limited as to the issue of -- plaintiff
25 has raised the issue of salaries for American-born professors

1 versus foreign-born, and that would be the nature of his
2 testimony. Again, it would be extremely limited.

3 **THE COURT:** Yes, Mr. Bigelow?

4 **MR. BIGELOW:** If I may, Your Honor. Just for the
5 record, and I know it doesn't give a lot of extra leeway: I
6 did notify defendant of this yesterday evening when I came to
7 this realization, just for what it is worth.

8 **THE COURT:** Okay.

9 **MR. BIGELOW:** In addition to that, I believe that
10 Global Force Entertainment, the opinion by Chief Judge
11 Crenshaw that I attached today, is dispositive on this
12 matter. I mean, it almost tracks what defendant's arguments
13 are exactly and what the defendant just argued.

14 And -- and with that said, I will sit down.

15 **THE COURT:** Well, you know, I think it's a couple
16 of things. And I want to backtrack and make a broader
17 remark. And, you know, obviously this case didn't settle.
18 And I don't know why; I can't say, not knowing what the
19 lawyers know about the case, that it should or shouldn't
20 have.

21 I will say this: Going to trial and not settling
22 is for parties that really got all ducks in a row, all ducks
23 in a row. Otherwise, everyone's courting trouble. All the
24 ducks gotta be in a row or you shouldn't feel that good about
25 going to trial.

1 And, you know, there have been a couple of things
2 that I've seen that -- telling me maybe not all ducks are in
3 a row; probably going to talk about some more. And what I
4 want to say here is I agree with Mr. Bigelow. I mean,
5 listen, the defendant didn't have all their ducks in a row if
6 they're calling -- if they are putting, on their witness
7 list, a bunch of people that were never identified, if I
8 understand correctly, Mr. Bigelow, in any way, shape, or form
9 that they might be witnesses. In like, any way at all?

10 **MR. BIGELOW:** That's correct, Your Honor.

11 **THE COURT:** That's very problematic. Like, to the
12 point, like, well, a person that wants to call witnesses at
13 trial were never identified as potential witnesses, maybe
14 that's someone that doesn't need to be going to trial.

15 On the other hand, there is an issue with the
16 lateness of the motion in limine. Maybe that's someone that
17 shouldn't be moving to exclude in limine when it's just
18 been -- it's just been so long while the -- that the
19 information has been obtained.

20 And by Mr. Bigelow's own admission, apparently he
21 didn't even know at first that they weren't disclosed. It
22 was only later he figured out why there was a problem. It
23 wasn't even front and center that he didn't know about these
24 witnesses apparently, because it didn't occur to him that
25 they hadn't been disclosed. That's by his own statement.

1 So on this particular motion in limine, I'm not
2 going to rule on it right now. I don't think I need to yet
3 because we haven't gotten to the defense case in chief. If
4 the defendant wants to file something, they can.

5 I mean, here's the way I look at it. You know,
6 there are real problems with both sides. And, you know, I
7 understand that it's really, really a problem for the
8 defendant not to have identified them as witnesses. I mean,
9 I suppose it helps the defendant that the testimony
10 purportedly would be pretty limited. It is a big problem,
11 though, and it is grounds for exclusion.

12 But I don't know the effect of the lateness of the
13 motion in limine. And I want to consider that and hear
14 anything anyone has to say about that piece of it. Because
15 with the deadline for motion in limine passed, we get within
16 one day of trial, you know, the defendant may have gotten,
17 you know, understandably the signal that, well, however it's
18 building its case, it's going to use these witnesses and that
19 there's going to be no objection to that.

20 A late-filed motion in limine like this could be
21 prejudicial, unfairly prejudicial in a sense that requires,
22 you know, the motion to be defeated. But I'm not sure.

23 So I'm not up here to sort of criticize counsel.
24 I am saying -- but I do need to point out the problems with
25 each side's position on various issues. And as the one

1 responsible for this trial, I do want to note that, you know,
2 the expectation, anyone wants a day in court, ducks need to
3 be in a row.

4 Yes, Mr. Bigelow?

5 **MR. BIGELOW:** Your Honor, the motions in limine
6 were due the exact same day as the motions for the witness
7 list, so it would have been impossible, I suggest to the
8 Court, for me to have been that good. I'm not saying I was
9 great, but I couldn't have been that good.

10 **THE COURT:** I agree. It would have to be like to
11 have met that -- and that's a fair point. To have met that
12 deadline, have to be like, well, you know, you would have had
13 to have seen it if it was filed before the motion -- you
14 know, if the witness list was provided before 11:59 p.m. on
15 the 17th, you would have theoretically had a shot, but I
16 don't expect that.

17 But I do think the fact that the deadline was the
18 17th is the kind of thing that indicates, well, you -- you
19 know, understanding that there is reason to -- and under
20 these circumstances, to have, you know, the motion come
21 thereafter, it would -- I think it would indicate a prudence
22 of being as quick as possible.

23 I do -- so again, I'm not here to sort of like
24 fuss at counsel. But I think that there -- you know, there
25 are issues with both sides here, and obviously, the Court

1 will have to make a call on this.

2 You know, I had issued an order regarding
3 Dr. Jackson, and I do want to explain that.

4 And I was alluding to this when I said, well, you
5 know, these things have gone both ways. As it turns out,
6 Mr. Bigelow has gotten some relief from his not listing a
7 witness on the witness list, which is a different error than
8 what the defendant has done with these four witnesses.

9 But the basis for the Court's ruling on
10 Dr. Jackson and the ability to read the deposition
11 transcripts is that it does look like under the applicable
12 standard, it's excusable neglect. And, you know, I had had
13 some dialogue with Mr. Bigelow who, you know, ultimately had
14 to concede that, well, this -- you know, not designating
15 these deposition transcripts may be neglect, but it is
16 excusable.

17 And I think, and particularly in light of the lack
18 of contrary authority or written argument, after plaintiff
19 filed a supplemental brief on this issue, I am persuaded by
20 Mr. Bigelow's argument.

21 You know, as he notes in the case of
22 *Gardner v. Dye*, unreported case but it's out of this
23 district, and I think it's accurate: There is a standard
24 here that I do think we are looking here at the standard of
25 excusable neglect. That's the good cause standard. That's

1 really the standard we use for this.

2 And in this particular case, we'd be looking at
3 several factors. And I do think, you know, there's always
4 first factor, prejudice to the nonmoving party, which would
5 be the defendant. There's always a certain amount of
6 prejudice in the sense that it's negative to them to have to
7 respond to a late designation. But it's not that big of a
8 deal in terms of the sort of late or extra work required.

9 Another factor is the length of the delay and its
10 potential impact on judicial proceedings. I do think that
11 the issue was raised at a time that wasn't -- that made the
12 delay not so long that it was sort of unrecoverable for the
13 defendant to respond to it. And I do feel like the impact on
14 judicial proceedings of the late designation wasn't
15 particularly big.

16 The reason for the delay I think cuts in the
17 plaintiff's favor. The delay in designating -- you know,
18 past the deadline for designating Dr. Jackson's deposition
19 testimony really, I think, from the record, makes clear that
20 although there should have been designation done by
21 plaintiff's side, that's sort of belt and suspenders. The
22 reason was, you know, Mr. Bigelow, in good faith, was trying
23 to -- trying to figure out whether any designation would be
24 necessary at all or if there would be some other way to avoid
25 it, for example, by just allowing the plaintiff to testify to

1 what Dr. Jackson had said, a proposal that I think
2 ultimately, understandably enough, the defendant didn't go
3 along with.

4 But I think he was -- you know, the reason he
5 didn't designate, which means the reason for the delayed
6 designation, the reason he didn't designate initially was he
7 was, in good faith, trying to figure out whether any
8 designation would be necessary. And that cuts substantially
9 in his favor; then, whether the delay was within the
10 reasonable control of the moving party.

11 And I think it was in the sense that Mr. Bigelow
12 could have, you know, just designated while he tried to
13 figure out whether he'd have to actually rely on the
14 designated parts of the deposition testimony. So that cuts
15 against him.

16 But the fifth one, whether the late filing party
17 acted in good faith, I certainly do think there is good faith
18 here for the reasons I just alluded to. And also the other
19 thing is, you know, it's not like Mr. Bigelow was trying to
20 hide the ball that he was interested in getting Dr. Jackson's
21 testimony or testimony about, you know, Dr. Jackson's
22 statements to which she did testify in her own deposition.

23 You know, Mr. Bigelow, I think, was quite clear
24 that he wanted this to come into evidence, and he was just
25 trying to figure out, I think, how this might occur, whether

1 it would even need to be done via actually reading the
2 deposition transcript designation -- designations at all.

3 And then there's also the piece of it that he was
4 responding to a late disclosure that, you know, sort of
5 understandably -- it's understandable because even though it
6 would have been prudent, you need to designate anything you
7 want to rely on to be read as testimony at trial from a
8 deposition.

9 You do, but it was, I think, October 4th when he
10 learned of the issue here, and probably threw him for a bit
11 of a loop in a way that just makes it more excusable for not
12 handling everything about that late developing situation as
13 he should.

14 So that's why I overruled the defendant's
15 objection to these designated portions of the deposition
16 being read into evidence. That is subject to any objections
17 the defendant may have, and the defendant is also counter
18 designated, and so we're going to talk about whether there
19 are any objections to the designated portions of the
20 testimony.

21 Now, I don't know what my analysis ultimately is
22 going to be on, you know, the failure to identify at all the
23 witnesses that the defendant now wishes to offer. I don't
24 know what the analysis is. And I think it behooved the
25 defendant to file something in that regard with their view.

1 I would say it's possible that, you know, some of the factors
2 and standards that I had talked about are going to be the
3 same ones to apply to the plaintiff's motion in limine as to
4 those four witnesses, but we'll see.

5 All right. So that motion in limine remains
6 pending. Obviously, before the defense case in chief starts,
7 we'll need to have a resolution, but that doesn't have to be
8 today.

9 Now, regarding the designations from each side, at
10 least for now -- and I would take a later objection if need
11 be. But I do want to know for now whether either side has an
12 objection to the other side's designation based on the
13 Federal Rules of Evidence.

14 Mr. Dalton, do you have any objections to, it
15 looks like we have 18 different specific designations by
16 Mr. Bigelow? Any objections under the Federal Rules of
17 Evidence, understanding you object to this as, you know,
18 designated too late?

19 **MR. DALTON:** Yes, Your Honor. And that -- we have
20 filed that. Of the 18, there are objections to four of them:
21 Designation 8, 10, 14, and 16.

22 **THE COURT:** All right. So that's the universe of
23 the objections?

24 **MR. DALTON:** Yes, Your Honor.

25 **THE COURT:** 8, 10, 14, and 16. Okay.

1 **MR. DALTON:** Yes.

2 **THE COURT:** Now -- and I'm going to rule on those
3 objections before it's time to read those.

4 When did you anticipate reading those,
5 Mr. Bigelow?

6 **MR. BIGELOW:** As the last witness of our proof,
7 Your Honor.

8 **THE COURT:** Okay.

9 **MR. BIGELOW:** And to make it a little bit easier
10 on the Court, if I may, Your Honor, --

11 **THE COURT:** Yeah.

12 **MR. BIGELOW:** -- we have no objections to 10 and
13 16. In other words, we're more than happy to read more in to
14 get full context, which is what the defendant asked us to do.
15 We're fine with that.

16 The only counter -- the only arguments that we
17 have are with regards to No. 8, which is on page 44 of
18 Dr. Jackson's deposition where I ask Dr. Jackson about the
19 minimum qualifications of a successful candidate that will
20 have a record of scholarship and research includes
21 peer review and external funding.

22 And I asked if he had record of securing external
23 funding.

24 And she said: "I did not actually look as to
25 whether or not he did."

1 And I said: "Would it surprise you that his CV
2 has no mention of external funding?"

3 And she said: "It would not surprise me because
4 it's difficult to get funding -- to get funding."

5 And we suggest that this is all just her personal
6 knowledge. It's what she believed and what she knows or
7 didn't know, and that it's not hearsay.

8 **THE COURT:** All right.

9 **MR. BIGELOW:** As far as 14 is concerned, which is
10 page 79, lines 15 through 18, Dr. Jackson testifies that she
11 wasn't aware of people's backgrounds, but she said she did
12 know that he was an inter- -- "So I'll just say international
13 because I have no clue, and it doesn't matter to me."

14 We think that is not at all hearsay. It's her own
15 statement as to what she knows and doesn't know and
16 specifically that Dr. Jara was a, quote, international.

17 **THE COURT:** It's also -- it's also not hearsay
18 because it's not offered for the truth of the matter
19 asserted, right? Everyone knows that -- you know, I think we
20 all would agree the reference to international means someone
21 who is of foreign national origin, right?

22 **MR. BIGELOW:** Yes, Your Honor.

23 **THE COURT:** It's not offered to prove that;
24 there's no dispute about that. So I would agree it's not
25 hear- -- even if it was -- even if there was some

1 out-of-court statement that Dr. Jackson alluded to in her
2 testimony, which there is not, it certainly wouldn't be
3 introduced for the truth that Dr. Jara is a, quote,
4 international. So I don't see a hearsay problem for a couple
5 of different reasons.

6 Mr. Dalton, am I missing something?

7 **MR. DALTON:** I understand, Your Honor. Defendant,
8 in their response, also cited Federal Rule of Evidence 602 as
9 to lack of personal knowledge --

10 **THE COURT:** Yeah, and let's talk about that.
11 Here -- here's the thing. Would not that particular rule of
12 evidence, lack of personal knowledge, isn't that really
13 relevant to the context of when -- again, the -- well, let me
14 back up and say it this way. The rule requiring personal
15 knowledge of a witness and the rule against a witness
16 testifying as to hearsay statements, statements introduced to
17 prove the truth of the matter asserted and the out-of-court
18 statement, they sort of have -- they're similar in many ways,
19 but they are technically very different in how you implement
20 them.

21 I do think that both of them really are directed
22 more at -- and I think they're both directed at not allowing
23 a witness to testify to something to convince the jury that
24 information is true when the witness lacks personal knowledge
25 that the fact is true.

1 Here, again, like -- let's say that Dr. Jackson
2 does lack personal knowledge of whether the plaintiff is an
3 international. I think that's debatable. I think that's
4 very debatable. But since, you know, under the Rules of
5 Evidence, there just needs to have to be circumstances
6 sufficient for the jury to find that she had personal
7 knowledge. That's the standard. And on this record, I doubt
8 that it could be said that the jury would not have sufficient
9 information to conclude that she has sufficient information,
10 having dealt with Dr. Jara, to know that he was an
11 international.

12 But even if there was a lack of sort of personal
13 knowledge, would this objection even apply when, again, it's
14 not offered to prove the truth of the matter asserted? It's
15 really about what Dr. Jackson believed, right? Like, that's
16 the significance of what Dr. Jackson believes about the
17 plaintiff being an international because again, you know, the
18 plaintiff is not relying on Dr. Jackson to establish the fact
19 that the plaintiff is, in fact, an international.

20 And so I'm not sure how relevant the objection,
21 lack of personal knowledge, is when the import of the -- her
22 statement that plaintiff was an international, that she knows
23 plaintiff was an international is simply the fact that she
24 knows it, not that it's true. The information that he is, in
25 fact, an international is going to come from somewhere else.

1 Do you see what I'm saying?

2 **MR. DALTON:** I do, Your Honor.

3 **THE COURT:** Okay. I -- and here's the thing. I
4 never begrudge a party an objection based on lack of personal
5 knowledge, because a lot of times, things come in at trial
6 where that objection could be made. I think a lot of times
7 the objection is missed, frankly. And so I never sort of
8 begrudge someone doing that.

9 And a lot of times, like in a deposition, the
10 basis for a witness's knowledge as to facts that they testify
11 about is not very clear. I understand that.

12 So, hey, it's fair game to make that objection.
13 Here, I do think that, you know, lack of personal knowledge
14 is not compelling because really, the significance is not the
15 truth of what she purports to know. It's simply that she
16 really claims to know it.

17 And I think the other reason is, if you read the
18 deposition transcript, I do think that she would have
19 demonstrated just enough knowledge about the plaintiff for a
20 jury to find that she knew that anyway. And so for that
21 reason, I'm going to overrule the objection to No. 14.

22 No. 8 is a little trickier, but before we do that,
23 10 and 16, you know, if Mr. Bigelow puts the designated
24 testimony more into context, does that resolve the objection?

25 **MR. DALTON:** Yes for defendant, Your Honor.

1 **THE COURT:** All right. Thank you.

2 Now, No. 8, let's talk about that. Is there
3 very -- like, very specifically, what in that exchange are
4 you objecting to? And I -- and I could see a basis for an
5 objection. But if you could describe, I think he's got
6 page 44, 13 through 24. There are various different things
7 in there. Is there anything in particular that you object to
8 more than others?

9 For example -- and believe me, at trial, I have
10 asked this kind of question and not got an objection, and
11 after the fact, I wondered why I didn't get an objection.
12 Here's what I'm -- I'm thinking of a particularly prominent
13 trial I had. And I asked of a prominent witness, "Would it
14 surprise you that," and when a question is phrased that way,
15 "would it surprise you that," it can really have an impact on
16 the jury. And I thought it was a fair question. I didn't
17 get an objection. Everything was fine.

18 After the fact, it occurred to me, is there any
19 independent relevance to whether that witness was surprised?
20 The question is, were you surprised, and arguably whether the
21 witness is surprised is actually not a fact of independent
22 significance even though it sort of leaves an impact on the
23 jury.

24 So part of that exchange is the question about the
25 were you surprised. There were other things that were going

1 on in that exchange. Could you tell me what in particular
2 you're objecting to?

3 **MR. DALTON:** I would say primarily, Your Honor,
4 the line 18, the question is did: "Dr. McMurray have a
5 record of securing external funding?"

6 Dr. Jackson's answer is: "There is a possibility.
7 I did not actually look at whether he had funding or not."

8 So she's saying she doesn't know or said she
9 didn't look at whether he had funding or not.

10 And then, as you mentioned, then there's the
11 question of: "Would it surprise you the CV does not mention
12 securing external funding?"

13 And, in fact, she says: "No, it would not
14 surprise me" because she knows funding is an issue.

15 I think primarily the objection was, she said she
16 did not look at whether he had funding or not. She doesn't
17 have knowledge about it.

18 **THE COURT:** The fact that she does not know
19 whether he had funding, are you asserting that that's --

20 **MR. BIGELOW:** That's hugely significant.

21 **THE COURT:** -- a fact itself of independent
22 significance?

23 **MR. BIGELOW:** That's of huge independent
24 significance, Your Honor, which is in part why we fought so
25 hard for getting all this in.

1 As you know, Dr. Jackson was the chair of this
2 committee. For her to testify that she didn't know whether
3 the person who actually got the job met a minimum
4 qualification for that job is hugely significant.

5 In addition to that, when I said, "Would it
6 surprise you that there's no mention," not only did she
7 earlier say, "Well, I didn't look, I don't know," but when I
8 said, "Would it surprise you," she said, "Well, no, because
9 not a lot of people have -- have -- have external funding."

10 That's hugely significant. In fact, that's the
11 crux of so much of our case. As Dr. Jara will testify to
12 later this afternoon, he had almost a million dollars of
13 external funding. That's a big deal.

14 **THE COURT:** So the fact that she was surprised, I
15 would say, is not independently significant, but the reason
16 why she was surprised might be, right? The reason is --
17 well, the statement that follows: "Well, you know, not a lot
18 of people have the funding."

19 **MR. BIGELOW:** I think both are significant. I
20 mean, you would hope that -- I mean, if you're applying for a
21 job at a law firm, Your Honor, and the person who runs that
22 law firm, if you didn't have a law degree and I said, well,
23 would it surprise you that Mr. Richardson at the time -- not
24 Judge Richardson -- doesn't have a law degree, and he says,
25 no, it wouldn't surprise me, I'd say, whoa, that's kind of

1 shocking.

2 **THE COURT:** Well, but I would say it's -- like,
3 the fact that the person like, yeah, I'm not surprised, and
4 the person doesn't go, gee, I'm surprised, I would say the
5 reason that it matters is why they aren't surprised.

6 But I hear what you're saying.

7 I do want to ask Mr. Dalton: Does she answer that
8 in the past tense or the present tense? Because I do think
9 that's a -- "I don't know" is very different, particularly no
10 one seems to dispute and both parties have had to -- both
11 parties have had to rely on the fact that there are current
12 memory problems with this witness -- first the defendant and
13 then Mr. Bigelow -- to establish the unavailability of the
14 witness so that the deposition transcript would be read.
15 There's no dispute that there have been memory issues.

16 I don't know if we've established memory issues at
17 the time of deposition. But the fact that there might have
18 been memory issues just highlights my concern which is that,
19 you know, if she's saying, well, you know, I don't know now
20 or I don't remember now, that is -- really is not the same as
21 saying that she didn't know at the time in question.

22 How does that read?

23 **MR. DALTON:** Well, Your Honor, the totality of her
24 language here, when questioned, "Did Dr. McMurray have a
25 record of securing external funding," there is a possibility,

1 "I did not actually look at whether he had funding or not,"
2 that's past tense. And then the question, "Would it surprise
3 you," "It would not surprise me because it's very difficult
4 to get funding -- to get funding," which seems to be her
5 current impression.

6 **THE COURT:** Okay.

7 **MR. DALTON:** So it's both, it looks like.

8 **THE COURT:** All right. I do think she has that --
9 I do think that's important testimony, "I didn't look."
10 Right? It's supposed to be a job requirement, isn't it, job
11 criteria? And she unequivocally says, "I did not look," so I
12 think that's got to come in.

13 The part about the surprise, I'm not as bothered
14 with the surprise part coming in because she does state a
15 relevant fact that explains her surprise. It dovetails fine.
16 And I don't want to strike the part about surprise to sort of
17 break up the testimony.

18 I do think, Mr. Dalton, that what we have there is
19 a witness saying -- and, you know, you're allowed to, you
20 know, to the extent you can, you know, sort of impeach this
21 testimony based on any memory problems if you have evidence
22 to support that. Right?

23 But she says, I didn't look. And, you know, then
24 she says, "Well, I wouldn't be surprised," which, to me, is
25 it's sort of like her saying, "Well, that's not particularly

1 unusual because," and then she states a very important fact I
2 think, you know: "Well, most people don't have this."

3 So I think that that comes in, although I would
4 say this: Does the question about surprise assume the fact
5 not in evidence? Because I am sensitive to, you know, these
6 questions that say, well, if such and so were the case, and
7 then you premise your question on facts not in evidence.

8 Is this CV going to come into evidence?

9 **MR. BIGELOW:** Absolutely, Your Honor.

10 **THE COURT:** Uh-huh. I figured. So this
11 deposition is going to be read last, and you expect the CV
12 already to be in evidence, right?

13 **MR. BIGELOW:** 100 percent, Judge.

14 **THE COURT:** All right. So that would resolve that
15 concern.

16 So for those reasons, I'm going to overrule the
17 objection. I've overruled two of these objections to 8 and
18 14. I'm going to say I sustain the objections to 10 and 16
19 to the extent that Mr. Bigelow will have to put his
20 designated testimony in context. That's the remedy for my
21 granting these objections.

22 The defendant's objections to the testimony there
23 in No. 8 and No. 14, of course, are preserved.

24 All right. Let's talk next about the verdict
25 forms. We did have revised verdict forms, and I wanted to

1 say a couple of things about these.

2 The plaintiff's second proposed verdict form, the
3 first thing I note, that question -- let me put it this way.
4 The questions here are based on the model which I invited to
5 say let's break out the verdict as to whether there was
6 discrimination against Dr. Jara based on race -- I mean
7 national origin. Let's break it out -- or one possibility is
8 to break it out by adverse employment action. Because to say
9 that someone is discriminated against really is to say that
10 they had an adverse employment action taken against them on
11 the basis of the protected class.

12 So that's an option, and we're going to talk about
13 that approach in a second. I would say Question No. 1,
14 though, even if we're breaking out adverse employment action
15 separately, is -- my first point is that that would not be
16 warranted because I issued an order saying that as a matter
17 of law, I am saying failure to get an interview is not
18 independently an adverse employment action. And here's why.

19 First thing is, you -- first thing I want to do is
20 compare the adverse employment action of not getting an
21 interview with the adverse employment action of not getting
22 the job for which the interview exists. And there is a
23 difference, because the difference between someone just
24 merely not getting an interview -- the difference between
25 interview/no interview can be ultimately immaterial because

1 the person might not have gotten the job anyway, and if that
2 were the case, there really would be ultimately no difference
3 in the terms and conditions of employment between getting the
4 interview and not getting it.

5 There's only a difference in the terms and
6 conditions of your employment if the discrimination is the
7 difference between not getting the job and getting the job.
8 That's what makes a difference in the terms and conditions of
9 employment. And that's why an interview is not -- failure to
10 give an interview is not an adverse employment action.

11 Now, let's talk about case law in this particular
12 point because there definitely is some. And as I sometimes
13 do, take the load off the law clerks, went and found it
14 myself because I think this is an interesting issue. And
15 here's what I found.

16 There are two Sixth Circuit cases. They're both
17 unreported. In that sense, they're not binding, but they are
18 persuasive. One is *Cook v. Caldera*, 45 F. App'x 371. And
19 this case stands squarely for the proposition -- and I'll add
20 one caveat at the end, though -- that a plaintiff cannot show
21 that his failure to be selected as one of the 14 applicants
22 to be interviewed for promotion was an adverse employment
23 action.

24 Now, the caveat here is, well, gee, if there are
25 only a few other applicants rather than 14 other ones, could

1 that make a difference, could it be a bigger deal not to get
2 the interview? I suppose so.

3 Also, could Cook have been really making a
4 judgment based on the facts of that specific case rather than
5 a broader rule that failure to get an interview for a
6 promotion is not an adverse employment action? It's
7 possible, but I don't think so.

8 I think it's taking the position that the nature
9 of a failure to get an interview is such that it is not
10 independently a change in the terms and conditions of
11 employment and therefore is not an adverse employment action.

12 *Cook v. Caldera* was, on the one hand, sort of paid
13 homage in the case of *Siegner*, S-E -- excuse me --
14 *S-I-E-G-N-E-R v. Township of Salem*, 654 F. App'x 223. It was
15 alluded to and, you know, cited as good law. Then *Siegner*,
16 though, then notes that for retaliation claims, which has a
17 broader definition of adverse employment action than general
18 discrimination claims, the rule may be different.

19 And they were unprepared to say that in the
20 context of the broader definition of adverse employment
21 action for retaliation claims, that a failure to get an
22 interview could not be an adverse employment action. But to
23 me, it leaves intact Cook's holding.

24 There's also a case out of the District of
25 Maryland that makes the point that I was focused on and it

1 makes it point-blank: *Hall v. Bausch & Lomb*, B-A-U-S-C-H,
2 and Lomb, L-O-M-B. Those from my generation will recall them
3 as sort of the pioneers in, like, soft contact lenses. So
4 it's that company who is the defendant.

5 In this case, the Court makes a very clear
6 distinction because there, the plaintiff's counsel, unlike
7 Mr. Bigelow, had taken the unwise approach of claiming only
8 the failure to get the interview as the adverse employment
9 action. Did not claim failure to get the promotion that was
10 associated with this interview as an adverse employment
11 action.

12 And Hall citing Cook says this makes all the
13 difference saying that the law is that lesser interlocutory
14 or immediate decisions do not affect the terms or benefits of
15 a plaintiff's employment the way final decisions do. And
16 they put this failure to grant an interview into that
17 category. Of course, if you don't get an interview, you
18 can't get the job, and I do understand that.

19 But again, what changes the terms and conditions
20 of employment is the difference between not getting the
21 promotion and getting the promotion versus not getting the
22 interview and getting the interview.

23 The Court here also notes that it concludes: By
24 choosing to contest only her non-selection for the interview
25 rather than her ultimate lack of promotion, Ms. Hall has

1 failed to demonstrate that she suffered an adverse employment
2 action.

3 And before that, the Court said: Here, Ms. Hall's
4 failure-to-interview claim lacks such a tangible employment
5 action circumscribing her claim to focus only on the
6 company's decision not to interview her rather than its
7 decision not to promote her. Ms. Hall fails to identify any
8 significant detrimental effect stemming from this
9 interlocutory decision.

10 And so what I'm saying is that -- I'm going to say
11 as a matter of law, on the law as I read it, failure to
12 interview does not itself constitute an adverse employment
13 action. But Mr. Bigelow does have the failure-to-promote
14 claim that he can assert before the jury.

15 Failure to interview is obviously part of the
16 process of failure to promote. But they are different, and
17 Mr. Bigelow will need to proceed under failure to promote and
18 not failure to interview.

19 So that's one thing. All right. The --

20 **MR. BIGELOW:** Your Honor?

21 **THE COURT:** Yes, sir.

22 **MR. BIGELOW:** May I address it just for a second?

23 **THE COURT:** Yep.

24 **MR. BIGELOW:** Just in the category of for what it
25 is worth, and I did not bring this to the Court's attention

1 and I probably should have. Under Proposed Jury Instruction
2 No. 6, you may or may not have -- and it's not going to
3 obviously trump anything you just said.

4 **THE COURT:** Sure.

5 **MR. BIGELOW:** But I did include two cases that
6 have allowed for the failure to interview, one being
7 *Aboubaker v. County of Washtenaw*, which is out of the Eastern
8 District of Michigan. It's just a non-published case. And
9 the only reason I say is this because we talked about it a
10 couple days ago.

11 **THE COURT:** Sure.

12 **MR. BIGELOW:** And the second is *Drews v. Social*
13 *Development Commission* which is out of the Eastern District
14 of Wisconsin. Frankly, that case was super convoluted and
15 just made things -- made things difficult. It allowed it.
16 The Court ultimately allowed it and they had some twisty kind
17 of reasons as to what ultimately happened and how the -- how
18 a jury calculated it. But just kind of for a --

19 **THE COURT:** Sure.

20 **MR. BIGELOW:** I didn't just come up with it and
21 drop the ball.

22 **THE COURT:** Well, you know, I mean, I think -- you
23 know, I -- and I do understand that. And even without the
24 case citations, it's good that you cite a case for that.

25 You know, the fact that the Sixth Circuit says we

1 can't say it wouldn't apply in the retaliation context would
2 tend to indicate it's not the most ridiculous assertion, even
3 in the general discrimination context.

4 And again, you know, there's not Sixth Circuit
5 case law that's binding on point, but the nonbinding
6 authority, which I think is sound, particularly given the
7 definition of adverse employment action, you know, it's
8 something that effects a material change in the terms and
9 conditions of employment. The difference between getting the
10 promotion and not does that. The difference between getting
11 an interview and not, I would say, really doesn't.
12 Retaliation context, it's broader, and that's why I think the
13 Siegner case came out the way it did.

14 But understanding that you had -- you know, you
15 had some cases that sort of support your position, I'm not
16 sure if they were exclusively in the general discrimination
17 context or not, but certainly if they were, you know, you
18 weren't pulling out of thin air, and I understand that.

19 The next thing that I want to talk about is this.
20 The revised proposed verdict form then talks about, you know,
21 pay being withheld and also talks about, you know, him --
22 Dr. Jara receiving more credit hours to teach. So those are
23 two additional assertions of adverse employment action.

24 What's the defendant's position on whether those,
25 as a matter of law, would constitute adverse employment

1 action, or are you disputing that they are, at least in this
2 case? Because like this jury, the way the questions are
3 written, this assumes that they are.

4 **MR. DALTON:** I agree, the way it is written. I
5 would -- I believe defendant would dispute that those are, in
6 fact, adverse actions.

7 **THE COURT:** Because you would -- I mean, you
8 realize that docking someone's pay is an adverse employment
9 action, but you might say, well, withholding pay may not
10 be -- like withholding pay for -- you know, I don't know if
11 the proof will show one paycheck or whatever. But you're
12 saying that that would not be substantial enough to qualify?

13 **MR. DALTON:** That's correct, Your Honor. It
14 amounted to -- and I think the proof will show -- there was a
15 delay in payment, but it was not withheld indefinitely.

16 **THE COURT:** Okay. All right. So one of the
17 things is, I think if it's disputed -- and, you know, I think
18 it's reasonable to dispute it. I don't think it should be
19 built in via an assumption into the question that it is. And
20 it is. That's how these questions are written. Not to say
21 that Mr. Bigelow can't rely on them. I mean, he's allowed to
22 argue them to the jury, Mr. Dalton?

23 **MR. DALTON:** Oh, he certainly can argue.

24 **THE COURT:** Argue that they are adverse employment
25 actions.

1 So it seems to me, Mr. Bigelow, what we have is
2 three adverse employment actions here, right: failure to
3 promote, we have receiving more credit hours to teach, and
4 that withholding of pay. Those three, right?

5 **MR. BIGELOW:** Yes, Your Honor.

6 **THE COURT:** Now, I did some research also on sort
7 of the issue of adding work to an employee. And the Sixth
8 Circuit case law, it's a little bit all over the place on
9 this if you ask me. But I think if you distill the case law,
10 it says, look, adding more work, like just more things to do,
11 is not a change in the terms or conditions of employment.
12 But adding more hours, more total cumulative hours to work,
13 would or could be.

14 Is the evidence here going to show that, well,
15 unlike some cases where someone's actually given more to do,
16 it actually doesn't increase the total number of hours.
17 Think about, let's say there was a security guard sitting at
18 the front desk. And he or she just kind of sits there and
19 watches the door. Then the employer says, well, you know, we
20 want you to get up and walk the halls. That's actually more
21 to do, but it doesn't increase the total number of hours of
22 their eight-hour shift.

23 It's that sort of thing where the Sixth Circuit
24 would say, look, that's not a change in the terms or
25 conditions of employment. It's not a big deal to have to now

1 walk around. You don't increase the total number of hours.
2 And it's certainly not additional work outside the scope of
3 your original job as a security guard.

4 In your case, is the evidence going to show that
5 by having more credit hours to teach, there was actually more
6 hours of work done by Dr. Jara?

7 **MR. BIGELOW:** What we're going to show, Your
8 Honor, is that by adding more hours for Dr. Jara and other
9 foreign-born professors, it diminished their options for
10 advancement which, of course, is an adverse employment action
11 under Title VII.

12 It didn't necessarily mean -- necessarily it meant
13 that they had less hours because, of course, being a
14 professor is a salaried position, it's a total different
15 deal.

16 **THE COURT:** Yeah.

17 **MR. BIGELOW:** But it's the equivalent of saying to
18 an associate in a law firm: "Hey, you don't ever get to talk
19 to clients. You don't ever get to do anything. Go in this
20 room and tell me when these words are on pieces of paper and
21 highlight it and hand it to me." Well -- which, that's the
22 argument. "It's going to be really hard for you to make
23 partner, and if you make partner, it's going to be really,
24 really hard for you to make equity partner."

25 That's the argument is that by saying to the

1 foreign-born professors, "Hey, you have 12 hours of classes."
2 That gives significantly less opportunity for them to do
3 really important things like get grants, write publications,
4 do things like that.

5 **THE COURT:** All right.

6 **MR. BIGELOW:** I mean, I could kill more credit
7 hours. I could say more likely than not that his national
8 origin was a motivating factor in diminished options for
9 advancement.

10 **THE COURT:** Sounds like that's more your theory,
11 and him giving more credit hours is part of why you say he
12 had diminished options.

13 **MR. BIGELOW:** Yes, Your Honor.

14 **THE COURT:** Yeah. All right. I could comment
15 more about this proposed jury verdict form and also the
16 defendant's, or -- I want counsel's thought on this -- could
17 we not just really ask the question whether there was what
18 I'm calling general discrimination on the basis of national
19 origin and the parties just argue it rather than trying to
20 break it out? I think I probably could break it out.

21 But would either side feel prejudiced that, you
22 know, the question for them is, was there discrimination.
23 They'll be instructed as to what that means, the three
24 elements. Not going to be a dispute about at least the first
25 one. And then there's an argument about the other two

1 elements with respect to each adverse employment action. But
2 the jury question just asks about discrimination.

3 On balance, I'm thinking maybe that's the way to
4 go, but what do you think, Mr. Bigelow?

5 **MR. BIGELOW:** Frankly, Your Honor, I did this
6 because the Court invited it.

7 **THE COURT:** Well, it's been --

8 **MR. BIGELOW:** And I actually like this. You kind
9 of convinced me that this is the route to go as opposed to
10 just, here are two questions, which is why I like it broken
11 down -- which is why I like it broken down like this.

12 I think if we change the -- obviously No. 1 is
13 gone, which, you know, is the ruling. If we change it to the
14 not getting promoted and then, second to that, instead of
15 saying received more credit hours, diminishing options for
16 advancement, which is clear under Title VII is allowed, that
17 could be what -- you know, that seems pretty clear, and I
18 like the fact that it's broken down.

19 And then as a third option, I do think that -- I
20 mean, I could be more clear as to his pay being withheld, but
21 I would suggest in any line of work, when people's pay is
22 withheld, that's an adverse employment action.

23 **THE COURT:** Well, I think you probably argue it,
24 you know, to the jury, you know, "Hey, here's the definition,
25 and wouldn't you agree that this sounds like a change in the

1 conditions of employment?" Because the conditions are you
2 get paid X date and he got paid Y date, and this is a
3 material change, so I think you can argue it.

4 Part of the reason I suggested doing this was to
5 help clarify things, and it's certainly served that function.

6 I'm not against breaking it out by adverse
7 employment action. I think both sides get something out of
8 it, doing it that way. But, you know, it means, you know,
9 it's a more complicated verdict form. I will draft a
10 proposal consistent with this, but it's going to have to
11 reflect the fact that except for failure to promote, the
12 element of adverse employment action is disputed on these
13 options. Right?

14 **MR. BIGELOW:** Yes, Your Honor. And honestly, with
15 Question No. 1 being knocked out, all it is, is four
16 questions. So we're not talking about, you know, 15, 20, 30
17 questions. There are only four questions.

18 **THE COURT:** All right. Understood.

19 All right. Mr. Dalton, you know, to an extent in
20 your revised version, sort of like your first one, you had
21 sort of done likewise. You know, in at least one place, you
22 had broken out an adverse employment action separate:
23 Failure to appoint him, that's Question 3, to the chair
24 position. So in that sense, you broke it out, an adverse
25 employment action separately.

1 But in Question No. 1., you actually asked the
2 question -- excuse me, Question No. 2., you asked the
3 question in the broad way that was not broken out by adverse
4 employment action.

5 Question No. 1 -- I think I might have touched on
6 this earlier -- I don't know that -- whether plaintiff was
7 the best qualified candidate is appropriately asked as a
8 separate question.

9 My question to you, rather than going through all
10 that individually is: What about the possibility of me
11 proposing a jury verdict form that is based on adverse
12 employment action by adverse employment action?

13 **MR. DALTON:** Yes, Your Honor, defendant would be
14 open to that. I do think, given we have the issue of two --
15 potentially two separate types of damages, which will be
16 compensatory and back pay, that there does need to be some
17 distinction made as to the specific findings of the jury as
18 to if they were to find discrimination, discrimination in
19 what area.

20 **THE COURT:** Uh-huh. I think that makes sense.
21 I'll try and craft a verdict form that, you know, is along
22 the lines of what we just discussed that's fair to both
23 sides, not prejudicial, includes some language in the jury
24 instructions that would account for this as well.

25 And that way, it will be sort of, you know, keep

1 everyone focused on what the alleged adverse employment
2 actions are. It will help tie, you know, I think, damages to
3 particular claims. I think it's a good idea, and I'll make a
4 proposal and then, of course, counsel can comment on it and
5 can, you know, approve of it or object to it or whatever. So
6 we'll do it that way.

7 All right. Next thing: On the summaries of the
8 case, the thing I wanted to note was this: I'm assuming that
9 these were shared with each other and there are no
10 objections; is that right? Counsel share the statements with
11 each other? Summary of the case to be read to the jury?

12 **MR. BIGELOW:** Your Honor, I don't -- I think that
13 we shared the initial, but I don't believe we shared the new
14 filings. That's just an oversight. But we did obviously
15 share the initial theories, but when the Court asked that I
16 change some of it to make it kind of more in tune with
17 what -- per the Court's instructions, I just filed that
18 frankly.

19 **THE COURT:** All right.

20 **MR. BIGELOW:** My apologies.

21 **THE COURT:** All right. And I thought I had said
22 to share it. Maybe I wasn't clear or whatever.

23 But let me ask you, Mr. Dalton, any objection to
24 the plaintiff's proposal there?

25 **MR. DALTON:** No, Your Honor, and I think what

1 Mr. Bigelow stated is correct as to the sequence of that.
2 But no objection.

3 **THE COURT:** All right. Then thank you.

4 Mr. Bigelow, any objection to the defendant's
5 theory?

6 **MR. BIGELOW:** No, Your Honor. Thank you.

7 **THE COURT:** All right. The second paragraph that
8 you have, Mr. Bigelow, I think there's an issue in the second
9 sentence because I think you're going back and forth between
10 the passive tense and the active. I would rephrase that
11 second sentence to avoid confusing the jury in terms of the
12 defendant allegedly, of course, discriminating against
13 Dr. Jara in a number of manners, and then frame everything in
14 terms of what the defendant did.

15 As it is right now, if you look, you say: "And
16 that he was discriminated against in a number of manners
17 including but not limited to being asked," so that's in the
18 passive voice. It's talking about without saying whose --
19 let me frame it this way: If you look at the sentence
20 structure: "Defendant discriminated against him in a number
21 of manners including but not limited by." Sentence structure
22 says we need to talk about what the defendant did to the
23 plaintiff, not in terms of what was done to the plaintiff.

24 So -- or let's back up and look at your original
25 sentence structure. "That he was discriminated against in a

1 number of manners," is what you wrote, "including but not
2 limited by being asked to take an Oral English Proficiency
3 screening." Okay. All right. He was discriminated against
4 in that manner. But then you say "failing to pay him." We
5 need to switch to the active voice. "He was discriminated
6 against by failing to pay him." Do you see what I'm saying?

7 So I was -- I've handwritten some changes to
8 phrase everything you have exactly as it is except putting it
9 all in the passive voice about what defendant allegedly did
10 to the plaintiff rather than what kind of happened to the
11 plaintiff. Does that make sense?

12 **MR. BIGELOW:** My parents, who were both teachers,
13 would be ashamed of me, but yes, that makes sense, Your
14 Honor.

15 **THE COURT:** All right. Well, thank you. You
16 would not be the first, Mr. Bigelow, to go back and forth
17 between active and passive voice.

18 I was a little concerned, though, because when
19 this is read, the jurors are going to be new to the case, so
20 if I was to say that he was discriminated against in a number
21 of manners including, dot, dot, dot, failing to pay him, they
22 may be like, well, who is doing the failing? Did this happen
23 to the defendant or was he the one failing, that sort of
24 thing.

25 All right. I'm going to proceed accordingly.

1 We will get you a proposed revised verdict form
2 and jury instructions which, we needed this discussion before
3 we propose a draft jury instruction, but I'm aiming for first
4 thing tomorrow.

5 All right. As far as I'm concerned, we've gone
6 much later than I thought. I always try and estimate how
7 long this sort of thing might take, but we could take a
8 break, call the jury up, and we'll start with the jury, and
9 we'll proceed with voir dire as I had mentioned earlier.

10 Anyone have anything else before we break? No?

11 **MR. BIGELOW:** Your Honor, and my guess is I hate
12 to stand up and make an argument that I have a feeling will
13 be summarily dismissed, but I have to ask. The more I've
14 gotten into voir dire and kind of a lot of the intricacies of
15 this case, is there any way that the Court would allow an
16 additional just 30 minutes for each side? At 30 minutes,
17 it's going to be really, really hard to parse the feelings of
18 a jury with regards to a national origin case.

19 **THE COURT:** So you want 33 minutes?

20 **MR. BIGELOW:** No, an additional 30 minutes.

21 **THE COURT:** Oh, I thought you said an additional
22 three.

23 **MR. BIGELOW:** To go from 30 to an hour each.

24 **THE COURT:** Boy, an hour --

25 **MR. BIGELOW:** Or even 45. Just, I feel as though

1 half an hour is going to be a tough way to get people's
2 feelings on an issue that is a difficult issue for some
3 people, frankly.

4 **THE COURT:** I'll make you a deal. We're going to
5 go 30 minutes. If you can persuade me after 30 minutes that
6 you need more time -- and maybe you won't -- then I'll
7 consider it.

8 **MR. BIGELOW:** Thanks, Judge.

9 **THE COURT:** Fair enough?

10 **MR. BIGELOW:** Fair enough.

11 **THE COURT:** All right. We'll do it that way.
12 We'll call up the jury. We'll take a . . .

13 All right. Figuring out how long it makes sense
14 to take a break for. We'll say ten minutes, and we'll go
15 from there.

16 All right. Thank you. We stand in recess.

17 (Recess 9:56 a.m. to 10:10 a.m.)

18 **THE COURT:** All right. We're going to call in our
19 venire, and we will go from there.

20 * * *

21 *(WHEREUPON, a jury was impaneled. Transcription*
22 *was not requested. When and if transcribed, jury selection*
23 *will be Volume I-A.)*

24 * * *

25 (WHEREUPON, the jury was excused from the

1 courtroom, with matters being heard in open court as
2 follows:)

3 **THE COURT:** All right. Thanks, counsel.

4 You may be seated.

5 All right. If we have any additional matters, we
6 can take them up when we return. Anything that occurs to
7 anyone prior to going to instructions and opening statement?

8 **MR. BIGELOW:** Nothing from me, Your Honor.

9 **THE COURT:** Mr. Dalton?

10 **MR. DALTON:** No, Your Honor.

11 **THE COURT:** All right. Very well. No one needs
12 to stand as I leave, but I'm going to leave the bench.
13 You're welcome to keep, of course, everything here, and we'll
14 see you about, let's say, 1:15.

15 (Lunch recess 12:18 p.m. to 1:21 p.m.)

16 **THE COURT:** All right. Do we have any preliminary
17 matters we need to take up?

18 **MR. BIGELOW:** Nothing from the plaintiff, Your
19 Honor.

20 **MR. DALTON:** Your Honor, for defendant, first we
21 want to make clear we wish to invoke the rule for purposes of
22 the trial.

23 **THE COURT:** All right.

24 **MR. DALTON:** And I'm -- this is not going to work.
25 You know, when Mr. Bigelow mentioned he wanted to use a

1 whiteboard for the -- his opening with the jury, he mentioned
2 one, not three. This blocks our view of the jury, and we
3 cannot -- we're not going to be able to see what he's
4 writing.

5 **THE COURT:** Well, you bring up an interesting
6 point, Mr. Dalton. I don't know as I've ever seen three
7 different things on easels blocking opposing counsel's view.
8 What's the response to that?

9 **MR. BIGELOW:** Two responses, Your Honor. First
10 is, whether it was -- whether it was one or three, defendant
11 would still have the same view, which is none.

12 Second, defense counsel is more than welcome to
13 sit on over here and watch what I do. I have no issue with
14 that whatsoever if that's the issue.

15 **THE COURT:** Well, I understand that that can be a
16 remedy. On the other hand, tends to make opposing --
17 honestly, it tends to make opposing counsel look sort of like
18 lackeys when they do that. And I'm not even being facetious
19 about that. That's my concern, you know, just have to -- you
20 just kind of have to sort of make do or sort of schlep over
21 there. I am a little concerned about that.

22 Is there any way you can put it in the corner over
23 there? Put those three over in the -- slant them that way?

24 **MR. BIGELOW:** Yeah, I could do that if you'd like,
25 Judge.

1 **THE COURT:** You know, I think that, you know, that
2 if you want to take a minute, satisfy yourself that you can
3 move them that way, you know, have them propped so that
4 generally speaking, opposing counsel can see them when you
5 write on them. I mean . . .

6 **MR. BIGELOW:** I'm not sure how -- I suppose I
7 could do that and then they could see them, Your Honor.

8 **THE COURT:** Yeah, I think -- you know, it doesn't
9 have to be pointed to them, but if it's just sort of tilted
10 enough, you know. I don't want to get too hung up on the
11 difference between one and three as long as counsel can see,
12 but I do want them to be able to see.

13 Do you really think you need three?

14 **MR. BIGELOW:** I do.

15 **THE COURT:** All right.

16 **MR. BIGELOW:** Does that work, Judge?

17 **THE COURT:** Yeah. I think you can see that,
18 right? That wouldn't block your view, Mr. Dalton, right?

19 **MR. DALTON:** Yes, Your Honor.

20 **THE COURT:** Okay. All right. Let's do that.

21 Regarding the rule, you know, I'll say it now,
22 I'll say it later, just a general announcement to the
23 courtroom. If you are here scheduled to testify or expected
24 to testify as a witness, please depart the courtroom at this
25 time. And counsel should be in a position to -- and be

1 expected to police the rule, as they will know better than I
2 who in the courtroom might be one of the persons expected to
3 testify.

4 All right. Anything else, Mr. Dalton?

5 **MR. DALTON:** No, Your Honor. Thank you.

6 **THE COURT:** All right. Mr. Bigelow?

7 **MR. BIGELOW:** Nothing from me, Judge.

8 **THE COURT:** All right. Then we'll call in the
9 jury, and we'll go from there. Thank you.

10 (Respite.)

11 **THE COURT:** May be a minute while we retrieve the
12 jury. One of the things that we're dealing with here is, due
13 to a heavy training schedule today for courtroom security
14 officers, Ms. Jackson is having to do double duty. It's not
15 quite the court security help to help move jurors from where
16 they need -- where they are to where they need to go, and so
17 that's slowing us down a little bit. Nothing we can really
18 do about it.

19 Mr. Bigelow, any further estimate or additional or
20 different estimate on the length of any opening? 30 minutes?
21 Is that what you're thinking?

22 **MR. BIGELOW:** Yes, Your Honor.

23 **THE COURT:** Something like that?

24 **MR. BIGELOW:** Hopefully less. I surprised myself
25 and got voir dire done in 30, so . . .

1 **THE COURT:** You did, on the nose.

2 Mr. Dalton, same estimate for you which was
3 certainly no more than 30 minutes, as I recall?

4 **MR. DALTON:** Oh, that would be quite adequate,
5 yes.

6 **THE COURT:** All right.

7 **MS. CARTER:** Judge, while we have a minute, I
8 don't know which exhibits Mr. Bigelow will get to today, but
9 we had raised an issue about the fact that some of the
10 exhibits have reference to retaliation in them, and, of
11 course, that's not a claim that continues to exist.

12 **THE COURT:** All right. What is the response to
13 that, Mr. Bigelow?

14 **MR. BIGELOW:** I don't believe any of the exhibits
15 that I will ultimately ask to be entered into evidence have
16 any reference to retaliation.

17 **THE COURT:** All right. Then here's what I'll do.
18 When an exhibit is offered, I'll ask, "Any objection?" If
19 you need to take a minute to satisfy yourself on that point,
20 then please do so. And if there is an objection because you
21 think that that objection or, for that matter, any other
22 objection is raised, we'll take it up.

23 **MR. BIGELOW:** Opposing counsel had asked that I
24 redact -- there's, I think, only one exhibit that we intend
25 to enter into evidence that has the word "retaliation," and

1 they asked that I redact that word, and I did just that. And
2 it's in there. It's --

3 **THE COURT:** Perfect. In your copy?

4 **MR. BIGELOW:** Yeah, it's in their copy as well,
5 yes, Your Honor. It's in Exhibit 7.

6 **MS. CARTER:** Okay. I'm -- I'm looking at
7 Exhibit 10.

8 **MR. BIGELOW:** Oh. I'm not going to enter 10, so
9 there's no worry.

10 **THE COURT:** So while we have a minute, do you have
11 any preliminary thoughts, Mr. Bigelow, about whether you have
12 any objections to defendant's designation of excerpts from
13 Dr. Jackson's deposition?

14 **MR. BIGELOW:** I have no objection, Your Honor.

15 **THE COURT:** Okay. All right. It's good to know
16 for when we reach that point.

17 **MS. CARTER:** Thank you, Judge.

18 **THE COURT:** Thank you, Ms. Carter.

19 **MR. BIGELOW:** One small point, Your Honor, and I
20 believe that this was already agreed upon, is that we,
21 neither plaintiff nor defendant, to confuse the jury is going
22 to offer anything about why Dr. Jackson is not here.
23 Correct?

24 **THE COURT:** Yeah. My impression was, of course,
25 that everyone's agreed that the unavailability piece of this

1 is satisfied. I don't think I need to say anything about
2 that except to say, hey, testimony can be offered -- under
3 certain circumstances, testimony can be offered by
4 deposition, and you should treat the testimony as if it was
5 coming straight from this witness stand, that kind of thing.

6 Did you plan to put someone up on, like, the Q&A,
7 read the Q and then the A?

8 **MR. BIGELOW:** I was just going to read it in, Your
9 Honor, if that's all right.

10 **THE COURT:** You can do it whichever way you like.
11 Just be clear what is the question and what's the answer.
12 You can read it yourself: Question, Answer, if you want to
13 do it that way.

14 **MR. BIGELOW:** Absolutely.

15 **THE COURT:** And, you know, this would sound like
16 a -- you know, it would sound like a picky point, but
17 sometimes it's not. You know, inflection that meets -- and I
18 don't think it will be an issue in this case, but sort of
19 inflecting the testimony in a way that's a little bit slanted
20 is something we want to avoid.

21 **MR. BIGELOW:** So the surprise thing, I shouldn't
22 say, "I was shocked"?

23 **THE COURT:** Yeah.

24 **MR. BIGELOW:** Okay. I won't do that.

25 **THE COURT:** Yeah. I mean, a little bit of that

1 can be appropriate to sort of match what's being said, but
2 I've seen it be abused.

3 **MR. BIGELOW:** I'm with you, Judge.

4 **THE COURT:** Yeah. I would imagine that, you know,
5 Dr. Jackson's testimony was, in terms of the manner in which
6 it was presented, probably fairly dry anyhow.

7 **MR. BIGELOW:** That's a good guess, Your Honor.

8 **THE COURT:** Fair to say? All right.

9 (WHEREUPON, the jury re-entered the courtroom,
10 with matters being heard in open court as follows:)

11 **THE COURT:** All right. Thanks for your continuing
12 service, folks. And I told you a little bit about how we'll
13 proceed. But as I indicated, the next step is to give you
14 some preliminary instructions about how to serve as jurors.
15 This will help guide you in your participation in the trial.

16 I'm going to talk about the duties of the jury.
17 And as jurors, it will be your duty to find from the evidence
18 what the facts are. You and you alone will be the judges of
19 the facts. You will then have to apply to those facts the
20 law as the Court will give it to you. You must follow that
21 law whether you agree with it or not.

22 Nothing the Court may say or do during the course
23 of the trial is intended to indicate or should be taken by
24 you as indicating what your verdict should be.

25 The evidence from which you will find the facts

1 will consist of the testimony of witnesses, documents, and
2 other things accepted by this Court as exhibits, and any
3 facts that the parties have agreed to or, in other words,
4 stipulate to, or that this Court may instruct you to find.

5 Certain things are not evidence and must not be
6 considered by you. I will list them for you now. First,
7 statements, arguments, and questions by lawyers are not
8 evidence.

9 Second, objections to questions are not evidence.
10 Lawyers have an obligation to their clients to make
11 objections when they believe evidence being offered is
12 improper under the rules of evidence.

13 If the objection is sustained by me, ignore the
14 question. If it is overruled, treat the answer that comes
15 like any other.

16 If you are instructed that some item of evidence
17 is received for a limited purpose only, you must follow that
18 instruction, meaning you must consider it only for the
19 limited purpose identified by the Court.

20 As you may know from TV or books or prior jury
21 service, the way our system works at trial is that the
22 parties offer evidence by either asking that an exhibit be
23 admitted into evidence or by asking a question they hope will
24 generate evidence in the form of an answer from the witness.

25 When the lawyer for one side offers evidence in

1 this way, the lawyer for the other side may object to the
2 offer of evidence or may not object. If there is no
3 objection, typically the evidence is accepted by the Court.
4 The term used is that the evidence is admitted.

5 So we say an exhibit or a witness's answer is
6 admitted into evidence, but if an objection is made, the
7 Court must decide whether to sustain the objection and,
8 therefore, exclude the evidence rather than admitting it.

9 Testimony or an exhibit that the Court has
10 excluded or told you to disregard is not evidence and must
11 not be considered. In fact, ideally the Court would stop you
12 from ever seeing or hearing this evidence so that there would
13 be nothing for you even to consider. But if you have gotten
14 a sense of the substance of evidence that I'm excluding, you
15 should disregard and not consider it.

16 Anything you may have seen or heard outside the
17 courtroom is not evidence and must be disregarded. You are
18 to decide the case solely on the evidence presented here in
19 this courtroom.

20 There are two kinds of evidence: direct and
21 circumstantial. Direct evidence is direct proof of a fact
22 such as the testimony of an eyewitness. Circumstantial
23 evidence is proof of facts from which you may infer or
24 conclude that other facts exist.

25 I will give you further instructions on these as

1 well as other matters at the end of the case. But keep in
2 mind that you may consider both kinds of evidence. During
3 the trial, you may hear the terms "deposition" and also
4 perhaps "interrogatory." A deposition is the testimony from
5 a witness taken under oath at a previous time. Certain
6 deposition testimony may be admitted into evidence and read
7 to you or played on video.

8 Interrogatories are written questions asked by one
9 party that are answered by another party under oath. Certain
10 interrogatory answers also may be admitted into evidence. It
11 will be up to you to decide which witnesses to believe, which
12 witnesses not to believe, and how much of any witness's
13 testimony to accept or reject. Based on your consideration
14 of the testimony, you may believe all, some, or none of a
15 witness's testimony. This is for you to decide. I will give
16 you some guidance for determining the credibility of
17 witnesses at the end of the case.

18 Let's talk about burden of proof. This is a civil
19 case. The plaintiff has the burden of proving his case by
20 what is called a preponderance of the evidence. That means
21 that the plaintiff has to produce evidence which, considered
22 in light of all the facts, leads you to believe that what the
23 plaintiff claims is more likely true than not true. To put
24 it differently, if you were to put the plaintiff's and the
25 defendant's evidence on opposite sides of the scales, the

1 plaintiff would have to make the scales tip somewhat on his
2 side, even if only very slightly. If the plaintiff fails to
3 meet this burden, the verdict must be for the defendant.

4 Those of you who have sat on criminal cases,
5 although I suppose we may not have had any on this particular
6 group, may have heard of proof beyond a reasonable doubt.
7 That requirement does not apply to a civil case. The
8 requirement here is preponderance of the evidence.
9 Therefore, you should put the beyond-a-reasonable-doubt
10 standard out of your mind.

11 So I want to say a couple of things about what you
12 found in your chair. Looks like you have been provided a
13 folder there that has a notebook and a writing implement, and
14 these are for your use to take notes if you wish to do so.

15 One thing about taking notes: They are really
16 used, if they are used, as a memory aid for you. Taking
17 notes is appropriate to refresh your recollection at the end
18 of trial about what witnesses said or didn't say, and this is
19 important because you won't have a written transcript of what
20 witnesses said. You'll have to remember it. Notes can aid
21 you in remembering such things.

22 But it's important to keep in mind that the notes
23 are not the evidence; rather, they are an aid to you to help
24 your memory, and you need to be guided by your memory and
25 rely on your memory as refreshed by notes, if you take notes,

1 as to what the witnesses said.

2 At the conclusion of each day of trial, please
3 place your notes and anything else that may be given to you,
4 although we may not have anything else in the folder, and put
5 them in the jury room when you leave. And remember, your
6 notes are only for your own personal use. There is a --
7 intended as an aid to refresh your own memory.

8 If it happens that for some reason, you are unable
9 to hear or perhaps even see a witness for some reason, please
10 raise your hand and let us know, and we'll resolve the issue.

11 So the trial is about to begin, and here's how
12 it's going to proceed. First, each party can make an opening
13 statement. An opening statement is not evidence or argument.
14 The purpose of an opening statement is for counsel to explain
15 to you what he thinks the evidence will show in this case.

16 So it's sometimes described as counsel's roadmap
17 for what the evidence will show. Its purpose is not to
18 present evidence or argue anything to you again. It's
19 supposed to be a description of what they believe the
20 evidence will show.

21 Then, after opening statements, the plaintiff will
22 present his witnesses, and the defendant then may
23 cross-examine each plaintiff's witness.

24 After that, the defendant has the option of
25 presenting its witnesses, and then the plaintiff's counsel

1 may cross-examine the defendant's witnesses. The way our
2 system works, since the plaintiff has the burden of proof,
3 the plaintiff does have an opportunity, if he wishes to do
4 so, to then have another round of witnesses called rebuttal
5 witnesses to respond to what the defendant put on.

6 Then after all the evidence is in, the attorneys
7 will make their closing arguments to summarize from their
8 perspective what the evidence showed and then to make
9 argument to you as to what your verdict should be based on
10 the evidence and the applicable law.

11 Then you'll be excused to begin your deliberations
12 after I do give you instructions about what the law is.

13 So that's how we will proceed.

14 At this time, Mr. Bigelow, are you ready to
15 deliver your opening statement?

16 **MR. BIGELOW:** Yes, Your Honor.

17 **THE COURT:** All right. You may proceed.

18 **MR. BIGELOW:** Thank you, Your Honor.

19 **THE COURT:** One thing we'll want to do, it occurs
20 to us, Mr. Bigelow, before we begin opening statements,
21 certainly before testimony but we'll do it before opening
22 statements: Let's have our jurors stand and raise their
23 right hand, and we will give them their separate oath as
24 sitting jurors.

25 It's a little bit different from the oath you gave

1 when we gave it to you earlier because now you are the
2 sitting jurors deciding this case.

3 Thank you.

4 (WHEREUPON, the jury panel was sworn.)

5 **THE COURT:** Thank you.

6 * * *

7 *(WHEREUPON, opening statements were given by*
8 *counsel for the parties. Transcription was not requested.*
9 *Further proceedings were had, as follows:)*

10 * * *

11 **THE COURT:** All right. Thank you, Mr. Dalton.

12 Okay. The rule has been invoked. Looks like
13 everyone is okay with it at each counsel table.

14 All right. Mr. Bigelow, if you would wish to call
15 your first witness.

16 **MR. BIGELOW:** Yes, Your Honor. I would call to
17 the stand Dr. Jara.

18 **THE COURT:** All right. He may come forward.

19 (The witness was sworn.)

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

* * *

PATRICIO JARA,

was called as a witness, and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. BIGELOW:

Q. Good afternoon, Dr. Jara.

A. Good afternoon.

Q. How are you, Patricio?

A. Good.

Q. Good.

A. Doing good.

Q. If you would, could you introduce yourself to the jury.

A. Good afternoon. My name is Patricio Jara. I was born almost 50 years ago in Chile. I been doing mathematics ever since I went to college. My mom got me through it. I got a full tuition award to do my master's degree. I got a master's degree.

I came to the United States about 20 years ago, and I got a teaching assistant position at LSU. I went for my Ph.D. I got my Ph.D. And then during this time, I was instructor and a teaching assistant three, four different universities. And then once you get your Ph.D., then you can apply to a professor position which I did.

1 And then I got a tenure track position at TSU. Came to
2 Nashville, met my wife. We have a family. We got grown kids
3 and 5-years-old twins that they had the best day of their
4 life yesterday because next year, I'm going to have to start
5 wearing a costume. They were disappointed that I wasn't
6 wearing a costume, so I guess from now on, I have to do that.

7 And, yeah. That's about me.

8 Q. And when did you start working at TSU, Professor?

9 A. I started in 2009, August 2009.

10 Q. You said you had received your Ph.D.; is that correct?

11 A. Yes.

12 Q. And you got it at LSU?

13 A. Yes.

14 Q. In case someone doesn't -- can you explain what a Ph.D.
15 is?

16 A. Well, it depends in the area that you're getting, but
17 usually mathematics, in order to get a Ph.D., you obviously
18 need a certain minimum amount of hours. Then you gotta pass
19 what is called a general exam which is grilling in front of
20 five professors for two or three hours, that they can ask you
21 anything about whatever class you've been taking.

22 After that, you're qualified sort of to start doing
23 some original research. And the standard, usually
24 mathematics, even though over the last years, that standard
25 has been going down a little bit in certain cases, usually is

1 to prove, make a significant contribution to the area. And
2 usually, the way that's measured is by having a publication,
3 an original result, something that nobody has ever done, and
4 you get it published.

5 Q. And were you teaching at LSU while you were getting
6 your Ph.D.?

7 A. Yes. I was -- like I say, I was -- I'm originally from
8 Chile, and I got a teaching assistant position. So every
9 department with a Ph.D. program which has a lot of students,
10 they usually have a small amount of what they call teaching
11 assistant positions which is sort of like instructor
12 positions, but they call them teaching assistants because not
13 only you are required to teach, but you're also required to
14 be a student. So you're a teaching assistant.

15 And during that time, usually what happens is
16 obviously, a university, especially with foreign students, in
17 which case mathematics department all over the United States
18 is a very, very, very diverse environment. You get to meet
19 people from all over the world. And in that case, there are
20 requirements. The university makes sure that you have to
21 satisfy some English requirements, that you pass these
22 courses, because you are from abroad, right? So they make
23 sure that you satisfy those English requirements.

24 And I lost track. Where were we?

25 **THE COURT:** Yeah, maybe break these questions down

1 a little bit more.

2 **MR. BIGELOW:** Absolutely.

3 **BY MR. BIGELOW:**

4 Q. Can you tell the jury what your thesis was for your
5 Ph.D.?

6 A. Russian approximation schemes for the abstract culture
7 problem.

8 Q. Okay. I won't ask you what that is, but it's -- that's
9 beyond me.

10 So what was your position that you were initially hired
11 for at TSU?

12 A. I was hired as an assistant professor.

13 Q. And have you ever been promoted?

14 A. Yes. I was promoted to associate professor.

15 Q. And did you ever receive raises?

16 A. I received one merit-based raise from that promotion,
17 and the rest of the raises have been the cost-of-living
18 raises that happen across the board.

19 Q. What courses did you originally start teaching at --
20 when you started as TSU?

21 A. I started the -- the director at the time, Dr. Sandra
22 Scheick, brought me and a group of professors because they
23 wanted to increase the number of the students in the graduate
24 program. They actually have gotten a big grant at the time.
25 It was a million-dollar grant, and then they wanted to start

1 increasing the numbers of graduate students.

2 The very first semester I got there, they give me basic
3 courses after I guess I passed the -- paid my dues or
4 whatever. They immediately put me to teach more advanced
5 courses including graduate courses.

6 Q. Do you like teaching upper-level courses?

7 A. Absolutely. That's what we -- that's what we do for a
8 living. I mean, it's -- the idea is that when you want to do
9 research is, sure, you want to do higher-level stuff. But
10 then in order for you to polish yourself, to polish your
11 ideas, you want to teach these high-level courses, these
12 courses that are challenging, these courses that students get
13 challenged and they challenge you back, because their
14 questions are actually not -- they start connecting between
15 all the courses.

16 Q. Can you give me -- can you give me some examples of
17 higher-level math and what it's used for?

18 A. What it's used -- oh, yeah. We live in very, very,
19 very interesting times. For example, you've seen -- we know
20 we have rockets for a long time, right? But nowadays, we
21 have a rocket that actually can land itself back. That has
22 never happened except during the last couple of years.
23 That -- even the owner of the company admitted that that's
24 just calculus. It's heavy, hard-core calculus, but it is
25 calculus.

1 Another example, industry, they use it all the time.
2 For example, in a -- similar to this, in a Coke can. In a
3 Coke can, you have a tremendous amount of mathematics in it.
4 The Coke can is built so you can stack things up. It has
5 very thin walls so it's cheap. It has a little sphere, a
6 little bubble at the bottom; I don't know if you've noticed.
7 That's designed so that the Coke can, whenever it's frozen
8 for any reason -- you put it in the freezer when you're not
9 supposed to, right -- when it explodes, it doesn't shatter
10 everything, right, so it gets like a little ball, and then --
11 so it has a lot of math. It has a lot of physics too.

12 And in addition to that, we live in very exciting times
13 to do mathematics. Everybody nowadays have a cell phone
14 which is like ten times more powerful than the computer it
15 was used to go to the moon. For a few hundred bucks, you can
16 buy hardware that can resemble what I used to use as an
17 undergraduate as a super computer that I had to apply for
18 hours. Now you can just buy for a couple of hundred bucks
19 and put it in your machine.

20 So it's very exciting times to do mathematics, to do
21 research, to teach, you know, students.

22 Q. What -- in an academic setting, what are publications?

23 A. So a publication is generally something that you -- you
24 can publish your thesis. You can publish your work. You
25 publish original research, you submit it. This was --

1 actually was initiated in Europe by Heva Cite [phonetic].
2 They didn't trust his writings in the London Mathematical
3 Society, British Mathematical Society, so then they started
4 introducing the system of peer review.

5 So what happens is that you do original research, you
6 claim it's original. You send it over to an editor of a
7 journal. This editor picks up professors across the globe --
8 they can be from the United States, they can be from
9 somewhere else -- send them the document, verify that this is
10 actually original, has never been done before, make the
11 comments, and suggest if they're going to publish in a
12 certain journal or not.

13 Q. And why does it matter at all in a university setting?

14 A. Well, that demonstrates that you actually are at the
15 top of your field, that you're doing new things, that you're
16 contributing to the area in which you're actually supposed to
17 be teaching.

18 So it's one of the most challenging things to do.

19 Actually, the first thing that is your first bar when
20 you get a Ph.D., you just want to get a publication, right?
21 It's like -- it's that thing that you want to accomplish.
22 Then you get there, and then the next thing is, oh, can I
23 publish a paper by myself? Because that's another bar. I
24 mean, you get in groups and then, of course, you work faster.
25 But then the next thing is can I publish a paper by myself,

1 get only my name on it, because that means I did this all on
2 my own.

3 Q. So you go through four years of college, correct? And
4 then you get -- did you get your master's?

5 A. Yeah. Along the way, I got a master's degree at LSU.
6 I had a master's degree from Chile. I got my tuition award
7 for that.

8 Q. And then how long until you got your Ph.D.?

9 A. Since the master's, probably two or three years.

10 Q. So it's eight or so years of higher education?

11 A. Uh-huh.

12 Q. So you could try and publish a paper that no one knows
13 about?

14 A. Yes. That's usually the case.

15 Q. Okay. And hopefully, impress your peers, correct?

16 A. Right.

17 Q. Yeah. What is a grant?

18 A. So a grant is, you want to -- the American system to
19 support universities is not like in Europe, for example. In
20 Europe, a university just gets a chunk of money from the
21 government.

22 So in the United States, you apply for grants. And
23 then it's competitive. And then if you get that grant, for
24 example, you get that grant from a federal institution like
25 the National Science Foundation or the Department of

1 Education, then not only they give you the money that you
2 asked for to do whatever it is that you want to do after you
3 went through a process, of course. And on top of that, they
4 throw at it double the money for the university to use it in
5 any way, shape, or form the university wants to use it.

6 So -- and that's the way that the federal government
7 supports American universities by using these grants.

8 Now, of course, it's not only the federal government
9 that give grants. It is the local government, there are
10 companies that give grants. So in general, what we try to do
11 is to bring this money into the university so we can use it
12 for more research to support students, right?

13 And usually, in grants, the same way that publications,
14 there are different categories. So, for example, you can get
15 a million-dollars grant for giving scholarships. Right? And
16 then the million dollars sounds very impressive, but what
17 you're doing is administering these scholarships that you
18 pass along.

19 Those are great grants, and we have done some education
20 grants too. In our case, we didn't ask for scholarships; we
21 asked for trying to do something with the students, some
22 research, right?

23 And there are another type of grants which is, for
24 example, the hard-core one, for example, are the National
25 Science Foundation, Division of Mathematical Sciences,

1 because that is 100 percent a grant that may be little in
2 terms of money, but it is supporting your research. And when
3 you get that award, that's like, that's a big deal.

4 Q. Are they required for advancement?

5 A. Not usually.

6 Q. Are grants required to advance in levels of being a
7 professor?

8 A. Let me put it this way. If you get a grant, you
9 advance. But it's not a requirement. So people can advance
10 if you don't have a grant. But once that you get a grant,
11 it's like you get grants on papers and you move up.

12 Q. Are they usually requirements in your experience to get
13 chair positions?

14 A. Yes, absolutely. So the idea of a chair is not longer
15 being yourself and your group of students. The idea of a
16 chair becomes help the department. Support the people in the
17 department. Support all these professors and all these
18 students. So if a professor is writing a grant, the chair
19 has to make sure that it gets provided with the support
20 necessary for the grant.

21 If the students are pursuing degrees, then the chair
22 must ensure that those students that are pursuing these
23 degrees have all the necessary tools for them to succeed.

24 Q. Have you secured any grants before you started working
25 at TSU?

1 A. Yes.

2 MR. BIGELOW: Okay. I'm going to ask that the
3 court reporter hand to you the -- what's marked as Exhibit 1,
4 if I may, or -- oh, I'm sorry.

5 BY MR. BIGELOW:

6 Q. You have a binder up there. If you would, please grab
7 that binder. Fantastic, thank you.

8 Dr. Jara, if you would, please look at what has --
9 under Tab 1, and I'm going to show it on the board so that
10 the jury can watch along. My apologies for not warming up
11 the machine earlier.

12 Do you recognize what I just handed to you, sir?

13 A. Yes.

14 Q. And it's the -- it's a Tennessee State University
15 employee verification form, correct?

16 A. Yes.

17 Q. And did you fill that out?

18 A. Yes. That's my handwriting.

19 Q. Okay. And it says your date of birth is February 27th,
20 1975?

21 A. Yes.

22 Q. And your highest degree is Ph.D., correct?

23 A. Yes.

24 Q. And under home country, what did you write?

25 A. Chile.

1 Q. And under ethnicity, what did you check?

2 A. Hispanic.

3 MR. BIGELOW: Okay. I ask this be admitted into
4 evidence as Plaintiff Exhibit 1.

5 THE COURT: Any objection?

6 MS. CARTER: No objection.

7 THE COURT: No? Will you, Ms. Carter, be doing
8 cross-examination?

9 MS. CARTER: Yes, Your Honor.

10 THE COURT: Okay. Very well, thank you.

11 All right. Exhibit 1, without objection, will be
12 admitted into evidence.

13 (Plaintiff Exhibit 1 was marked and admitted into
14 evidence.)

15 BY MR. BIGELOW:

16 Q. Dr. Jara, I'll ask you to please turn to Tab 4 --

17 A. Uh-huh.

18 Q. -- which is a cover for -- what is that? Is that an
19 e-mail that you were sent, a cover for an e-mail that you
20 were sent?

21 A. Yes. We received an e-mail asking us to fill out -- to
22 follow up the instructions on this.

23 Q. Okay. And the front of it, the top of it says Oral
24 English Proficiency or OEP Screening, correct?

25 A. Yes.

1 Q. And underneath it, it says: "The ability to
2 communicate effectively is an essential skill necessary for
3 all academic personnel to perform successfully in the
4 college."

5 You'd agree with that, wouldn't you? You need to
6 communicate effectively to teach?

7 A. Yes.

8 Q. And then it says -- underneath that it says: "Who?
9 All faculty in the College of Life and Physical Sciences.

10 "When?" It gives a time period.

11 And then it says "How," and it says "3-minute telephone
12 screening," correct?

13 A. Yes.

14 Q. When you first saw that, did you have any idea what
15 this was about? Well, first of all, did you see this? You
16 do recognize it, correct?

17 A. Yes.

18 Q. You received this, correct?

19 A. Yes, I received it.

20 Q. Okay. Did you recognize what it was for or have any
21 idea what it was about?

22 A. None when I received it.

23 **MR. BIGELOW:** Okay. Your Honor, I ask that
24 Plaintiff Exhibit 4 be admitted into evidence.

25 **THE COURT:** Any objection?

1 **MS. CARTER:** No objection at this time.

2 **THE COURT:** All right. Exhibit No. 4 will be
3 admitted into evidence.

4 (Plaintiff Exhibit 4 was marked and admitted into
5 evidence.)

6 **BY MR. BIGELOW:**

7 Q. Dr. Jara, underneath Plaintiff Exhibit 4, it says "OEP
8 Screening Link." Do you see that?

9 A. Yes.

10 Q. Right there where I'm pointing?

11 A. Uh-huh.

12 Q. And it says, underneath that: "For more information,
13 contact Dr. Lonnie Sharpe or Dr. Iris Johnson-Arnold,"
14 correct?

15 A. Yes.

16 Q. I ask that you turn to the very next tab which is
17 Plaintiff's Exhibit 5. And what this is is, there was a link
18 you could click on in that last part, correct?

19 A. Yes.

20 Q. And this was the link when you clicked on it; is that
21 correct?

22 A. Yes, that was the link.

23 **MS. CARTER:** Objection, Your Honor. If we can not
24 show the jury what this is until he addresses --

25 **THE COURT:** Fair enough. No publishing in advance

1 of admission.

2 **MR. BIGELOW:** That's fair.

3 **BY MR. BIGELOW:**

4 Q. Do you recognize seeing this?

5 A. Yes.

6 Q. And you clicked on a link and you saw this, correct?

7 A. Yes.

8 **MR. BIGELOW:** Okay. Your Honor, I ask that this
9 be admitted as Plaintiff's Exhibit 5.

10 **THE COURT:** Okay. All right. Any objection?

11 **MS. CARTER:** Yes, Your Honor. This -- I'm not
12 sure what this goes to or when he did this or how he became a
13 part of this, but this is not linked to any e-mail or to
14 Exhibit -- is it 4?

15 **MR. BIGELOW:** Okay. I'll take it slower, if I
16 may.

17 **THE COURT:** Is your microphone on, Ms. Carter?

18 **MS. CARTER:** Now it is.

19 **THE COURT:** Perfect. All right. Okay.

20 So it sounds like the offer of admission was
21 withdrawn as you seek to lay an additional foundation; is
22 that right?

23 **MR. BIGELOW:** Sure.

24 **THE COURT:** All right. You may continue.

25 ///

1 **BY MR. BIGELOW:**

2 Q. Dr. Jara, if you would, look at the upper right-hand
3 corner of this document. It says HTTPS. And it says
4 tnstate.edu; is that correct?

5 A. Yes.

6 Q. So it's from Tennessee State University; is that
7 correct?

8 A. Yes. That is the survey software that the university
9 uses. So when people write surveys and they want to send
10 them, they use Qualtrics which is the Qualtrics.com, and the
11 tnstate.edu is the server that Qualtrics associates the
12 university so they can write surveys.

13 Q. And was this linked to the Oral English Proficiency
14 screening page that you just testified to that was just
15 admitted into evidence?

16 A. Yes. After you click on it, that's what pop up.

17 Q. Okay.

18 **MR. BIGELOW:** Your Honor, I ask again that this be
19 admitted into evidence as Plaintiff's Exhibit 5.

20 **THE COURT:** All right. Any objection?

21 **MS. CARTER:** No, Your Honor. No objection.

22 **THE COURT:** All right. Exhibit 5 will be admitted
23 into evidence.

24 **MR. BIGELOW:** Thank you.

25 (Plaintiff Exhibit 5 was marked and admitted into

1 evidence.)

2 **BY MR. BIGELOW:**

3 Q. Dr. Jara, I want to go over this for a moment, actually
4 longer than a moment, frankly.

5 At the top of it, it states academically speaking, AS,
6 correct?

7 A. Yes.

8 Q. And then underneath it, it states it's an Oral English
9 Proficiency screening questionnaire. And it says: "Once you
10 complete the survey, you will be provided with the
11 instructions and call-in number to complete the telephone
12 screening." Is that correct?

13 A. Yes.

14 Q. When you first saw this, what was your understanding as
15 to why this was even given out?

16 **MS. CARTER:** Objection, Your Honor. It's been
17 asked and answered.

18 **THE COURT:** Response?

19 **MR. BIGELOW:** I don't think he answered it, but I
20 don't --

21 **THE COURT:** Well --

22 **MR. BIGELOW:** I can just -- it's fine. I can just
23 ask the question -- continue to ask --

24 **THE COURT:** Well, do you want to withdraw the
25 question?

1 **MR. BIGELOW:** Yeah, I'll withdraw it. That's
2 fine.

3 **THE COURT:** We'll do that, yeah. Whether it was
4 answered is probably debatable. So the question is withdrawn
5 and you may ask another.

6 **MR. BIGELOW:** Okay.

7 **BY MR. BIGELOW:**

8 Q. I'm going to highlight something for you, okay?

9 A. Uh-huh.

10 Q. Okay. The survey asks you what your native
11 language/dialect was; is that correct?

12 A. Yes.

13 Q. Do you see why TSU would ask you what your native
14 language or dialect was?

15 A. No.

16 Q. Okay. The survey also asks you -- now at this point,
17 you were already teaching at TSU, correct? When you saw
18 this, you were teaching there, correct?

19 A. Yes.

20 Q. You had already been hired?

21 A. Yes.

22 Q. In fact, you had tenure, correct?

23 A. I believe so.

24 Q. Okay. Now, it says -- it asks for your country of
25 origin. Do you see -- why would TSU ask for your country of

1 origin? Do you know?

2 **MS. CARTER:** Objection, Your Honor.

3 **BY MR. BIGELOW:**

4 Q. Do you know why they asked? I'm just asking what your
5 knowledge --

6 **THE COURT:** Well, hold on. We have an objection.
7 It sounds like you kind of withdrew that question and now
8 you'll be laying a foundation; is that right?

9 **MR. BIGELOW:** That's correct.

10 **THE COURT:** All right. So the question to which
11 an objection was made was sustained, but you may ask
12 questions to lay a foundation.

13 **BY MR. BIGELOW:**

14 Q. Do you think your country of origin is relevant to
15 whether you can teach at TSU?

16 A. No.

17 Q. I'm going to turn to the second page. I'll highlight
18 another thing for you.

19 The survey asked: "How long have you lived in the
20 USA?"

21 Do you think that is relevant for your teaching
22 abilities at TSU?

23 A. No.

24 Q. How did that make you feel when you read that?

25 A. That it's a very uncomfortable question because

1 usually, that type of question is thrown at you whenever you
2 are being told that you're not from here, that you should go
3 back. So that question there makes anybody feel
4 uncomfortable and it singles you out immediately, because it
5 makes no sense to ask somebody who has been born here, "How
6 long have you lived here?" Ain't got no relation with the
7 proficiency in English.

8 Q. Did it upset you?

9 A. Yes.

10 Q. Did it embarrass you?

11 A. Yes, a little. Like I say, it's one of those things
12 that when somebody tells you that type of thing, it's like
13 you know what you're being told. You know that it -- it's a
14 question that is to tell you you're not from here.

15 Q. Did you complete this examination or this
16 questionnaire, I'm sorry, and send it in?

17 A. No. I stopped. I started it, but I stopped. I did
18 not complete this.

19 Q. Who asked you to do it?

20 A. At the time, the interim dean of the college, Lonnie
21 Sharpe.

22 Q. Did you feel degraded at all?

23 A. Yes, absolutely. I actually immediately wrote an
24 e-mail to, at the time, my department chair, Dr. McMurray.
25 And I told him that I thought that this was inappropriate,

1 and I request that the information, if it was a requirement,
2 to be filled out.

3 **THE COURT:** Let's do this, Dr. Jara. What we'll
4 do is if you could answer the question asked -- and I know
5 that sometimes there's an urge to provide more information
6 than what is asked for. But Mr. Bigelow, if you would answer
7 his question. If he needs to follow -- to ask and follow up
8 with requests for additional information, he can do that. I
9 don't want you to feel like you sort of need to provide a
10 further explanation beyond just answering the question.

11 Does that make sense?

12 **THE WITNESS:** Yes, Your Honor.

13 **THE COURT:** All right. Thank you.

14 **BY MR. BIGELOW:**

15 Q. Dr. Jara, how many college students have you taught?

16 A. Over the course of the years, probably over 6-, 7,000.

17 Q. And of those 6-, 7,000 students, have you ever received
18 a complaint about anyone being unable to understand you?

19 A. No.

20 Q. Who did you interview with when you got the job at --
21 when you got your job at TSU?

22 A. The interview process is a long one. It's a whole day.
23 Usually starts in the morning when the chair of the hiring
24 committee picks you up from wherever you are staying
25 overnight. Usually you want to arrive there the day before.

1 I met, in this case, Professor Sathananthan. We went
2 out for breakfast. That, in and of itself, I took it as part
3 of my interview. He is after all, the -- he was at the time,
4 sorry -- after all, the chair of the hiring committee.

5 Q. And when you interviewed, did you interview with
6 multiple people?

7 A. Absolutely.

8 Q. Did anyone ever say to you, "I can't understand what
9 you're saying"?

10 A. No.

11 Q. Okay. Has anyone ever said that to you?

12 A. Yeah, it has happened, yeah.

13 Q. It has?

14 A. Yeah.

15 Q. But it hasn't happened with your students?

16 A. No.

17 Q. And it hasn't happened with your colleagues?

18 A. Maybe every now and then, you know. A word here, what
19 you said, something like that. But nothing that is like you
20 can't be understood.

21 Q. And after you interviewed at -- for TSU, you were
22 offered a job, correct?

23 A. Yes.

24 MS. CARTER: Your Honor, --

25 ///

1 **BY MR. BIGELOW:**

2 Q. And you took that job, right?

3 **MS. CARTER:** -- I'm going to object to the
4 continual leading questions.

5 **THE COURT:** I think that's fair.

6 **MR. BIGELOW:** I'm trying to speed it up.

7 **THE COURT:** Yeah, understood.

8 **MR. BIGELOW:** That's all I was trying to do.

9 **THE COURT:** Here's -- you know, I think if we
10 looked at that, here's kind of what I think. You know,
11 the -- and I'm going to take a little bit of time with this
12 to help counsel understand where I may be coming from in the
13 future. I do think that probably the objection -- and, in
14 fact, I am going to overrule it. I think it's a close call.

15 Here's the thing: Leading questions are generally
16 not allowable for what, you know, the rules kind of indicate
17 are preliminary matters, leading questions are appropriate.
18 I do think that for a totally undisputed fact like that, a
19 leading question is appropriate as a preliminary matter, so
20 I'm going to overrule the objection.

21 On the other hand, I do understand that some
22 leading questions are improper, and Mr. Bigelow, if he leads,
23 could be facing additional objections. We'll see.

24 All right. Thank you.

25 **MR. BIGELOW:** Thank you, Judge.

1 **BY MR. BIGELOW:**

2 Q. Dr. Jara, if you would, turn to Plaintiff's Exhibit 2.
3 And do you recognize that?

4 A. Yes.

5 **MS. CARTER:** Objection, Your Honor.

6 **THE COURT:** What's the objection?

7 **MS. CARTER:** This has no date on it and . . .

8 **THE COURT:** Well, let's do it this way. You know,
9 at an appropriate time, once it's offered, we'll see what
10 your response is. And that could -- what you just mentioned
11 could play into opposing the offer. But let's allow the
12 foundation to be laid first, and then we'll go from there.
13 And you can respond if and when it's offered.

14 All right. So I think the question on the floor:
15 "Would you turn to Plaintiff Exhibit 2. Do you recognize
16 that?"

17 So Dr. Jara indicated he had recognized it, and
18 you may go from there.

19 **BY MR. BIGELOW:**

20 Q. Do you recognize this, Dr. Jara?

21 A. Yes, I do.

22 Q. And what is it?

23 A. It's the policy of the university concerning the
24 affirmative action and equal employment opportunity.

25 Q. And it has "Tennessee State University, the Office of

1 Human Resources" on top of it, correct?

2 A. Correct.

3 Q. And at the bottom of it -- well, actually the second
4 page, I'm sorry, it has a bunch of different things in
5 reference including TBR policy numbers, affirmative action
6 plan, fair employment practices, and so forth, correct?

7 A. Correct.

8 Q. And there's also a link to what's -- looks like it's an
9 EO/AA complaint form; is that correct? On page 2 at the top.

10 A. Yes, I see it now. Sorry.

11 Q. That's okay.

12 Have you ever submitted an EO/AA complaint?

13 A. Yes, I have.

14 Q. Okay.

15 **MR. BIGELOW:** I will ask again that this be
16 admitted into evidence as Plaintiff's Exhibit 2.

17 **THE COURT:** All right. Response at this time?

18 **MS. CARTER:** Yes, Your Honor. There's been no
19 testimony or foundation laid as to when this existed or what
20 the form is that was submitted that's attached that's linked.
21 There's no date on the document, so . . .

22 **THE COURT:** All right. I -- I'll see whether we
23 need to have counsel approach. I understand you'll probably
24 be offering this on the grounds that this is relevant because
25 it is a document in effect at a time relevant to this

1 lawsuit, right?

2 **MR. BIGELOW:** That is correct, Your Honor.

3 **THE COURT:** All right. Do we have a basis for a
4 fact finder to conclude that that, in fact, is the case?

5 **MR. BIGELOW:** Have you -- I mean, I would think so
6 inasmuch as he testified that while he was working at TSU, he
7 has seen this and that he filed a complaint according to what
8 they asked to.

9 But, frankly, I don't even need this into
10 evidence, Your Honor. It's fine. I can just move on. I
11 mean --

12 **THE COURT:** Well, here's the thing. You could
13 withdraw the offer or I can call counsel up and we can talk
14 about it, your choice.

15 And I don't mean to imply one way or the other how
16 you should seek to establish your case. I would say you
17 could withdraw it, Option A. Option B, counsel can approach.
18 Do you have a preference?

19 **MR. BIGELOW:** I'll withdraw it.

20 **BY MR. BIGELOW:**

21 Q. I'll just say based on things that you've read from
22 TSU, you've already testified, and that you've submitted
23 what's called EO/AA complaints; is that correct?

24 A. Yes.

25 Q. Okay.

1 **THE COURT:** All right. Sounds like the offer of
2 Plaintiff's Exhibit 2 is withdrawn in any event, so I think
3 that resolves that. You may proceed.

4 **BY MR. BIGELOW:**

5 Q. In the time relevant to this lawsuit, did you have to
6 submit time sheets to TSU?

7 **MS. CARTER:** Objection, Your Honor. Can we define
8 the relevant time?

9 **THE COURT:** And the way the -- yeah. I see what
10 you're saying. In the time relevant to this lawsuit, and
11 you're thinking that that's kind of an indeterminate thing.

12 Are you able to nail down the time period you're
13 asking about?

14 **MR. BIGELOW:** Sure.

15 **BY MR. BIGELOW:**

16 Q. In 2007 and 2008 and 2009, did you have to submit time
17 sheets to TSU?

18 **MS. CARTER:** Objection, Your Honor. Can we
19 approach?

20 **THE COURT:** You may.

21 (WHEREUPON, a bench conference was had out of the
22 hearing of the jury, as follows:)

23 **THE COURT:** All right.

24 **MS. CARTER:** I thought our relevant time frame was
25 2016 to 2022.

1 **THE COURT:** Yeah, you said 2007 to 2009.

2 **MR. BIGELOW:** I did. I misspoke.

3 **THE COURT:** You meant '17 to '19?

4 **MR. BIGELOW:** Yeah, I did. I simply misspoke,
5 that's all.

6 **MS. CARTER:** Sorry. I just want the record to be
7 clear.

8 **MR. BIGELOW:** I just didn't think it was --

9 **THE COURT:** Yeah, I had the same reaction and I
10 was like, well, maybe --

11 **MR. BIGELOW:** No, that's on me.

12 **THE COURT:** Okay. All right. Thank you.

13 (WHEREUPON, the bench conference concluded, and
14 the following took place within the presence and hearing of
15 the jury:)

16 **THE COURT:** All right. Fair to say, Mr. Bigelow,
17 that any prior question referring to the years 2007 to 2009
18 is withdrawn?

19 **MR. BIGELOW:** '17, '18, '19.

20 **BY MR. BIGELOW:**

21 Q. In 2017, 2018, 2019, did you submit time sheets to TSU,
22 sir?

23 A. Yes, that sounds right.

24 Q. And is it odd to you that professors are asked to
25 submit time sheets?

1 A. It was very odd. Ever since I started working at TSU,
2 we were never required to submit time sheets.

3 In addition to that, the policy of the university
4 clearly states that the only person who submit the time for
5 employees is the department chair. During those times, the
6 policy was that as well, the written policy.

7 Q. And did you have to -- or actually, have your time
8 sheets always been accepted?

9 A. No.

10 Q. Dr. Jara, I ask that you turn to what's marked as
11 Plaintiff's Exhibit 6, and could you explain to me what that
12 is?

13 **MS. CARTER:** Objection, Your Honor.

14 **MR. BIGELOW:** Your Honor, I'm trying to either
15 make it quick and lead him and make it easier, or set up
16 everything. And I just am trying not to have to deal with
17 objection after objection. I just asked him what it is,
18 Plaintiff's Exhibit 6.

19 **THE COURT:** You know, the question on the floor at
20 the time was, "Could you explain to me what that is?" As
21 framed, it's either yes or no; yes, I can explain, no I
22 can't.

23 What's the basis for the objection?

24 **MS. CARTER:** Your Honor, I'm sorry. I may be
25 premature. I believe this calls for hearsay.

1 **THE COURT:** Okay. Well, here's how we'll proceed
2 in this regard. You know, if Mr. Bigelow's sort of laying a
3 foundation for admission, if you think that any of his
4 questions by which he's seeking to lay a foundation are
5 improper, you're welcome to object. I think it would be most
6 efficient to reserve any objection to the admission of the
7 document based on, for example, hearsay until the time it is
8 offered. We'll proceed that way.

9 All right. I take it the objection is withdrawn.
10 The question on the floor was, "Are you able to explain what
11 Plaintiff's Exhibit 6 is?"

12 And are you able to do so?

13 **THE WITNESS:** Yes, I am.

14 **THE COURT:** All right.

15 **BY MR. BIGELOW:**

16 Q. Could you please explain?

17 **THE COURT:** You may ask the next one.

18 **THE WITNESS:** Yes. After I complained about
19 several incidents with -- about the time sheets, I decided
20 that because I complained to the equal employment office,
21 because I complained to human resources, and it seems that
22 nobody -- nothing was happening, I decided to send an e-mail
23 directly to the president of the university and explain to
24 her the incidents that have happened ever since I started
25 having issues.

1 And among this is because when you follow the
2 chain of command at TSU, you're supposed to complain to your
3 department chair and then to your dean. Since this was about
4 the dean, you're supposed to complain to the vice president
5 of academic affairs, which I did.

6 Among that, then I did human resources, equal
7 employment, and nobody was doing anything, so I decided to
8 send an e-mail to the university president.

9 **BY MR. BIGELOW:**

10 Q. And I would like to take this line by line if I may.
11 You write -- and Glenda -- it's two --

12 **THE COURT:** Wait one moment.

13 **MR. BIGELOW:** I'm sorry.

14 **THE COURT:** Now, keep in mind, I do think that if
15 you were to read line by line, wouldn't it be sort of like
16 publishing the thing before it's admitted?

17 **MR. BIGELOW:** That's fair, Your Honor. Let me
18 follow up by this.

19 **BY MR. BIGELOW:**

20 Q. Did you attach anything to this e-mail that you sent?

21 A. Yes. I included a chronological list of some of the
22 incidents that I went through.

23 Q. And is that chronological list listed as Plaintiff's
24 Exhibit 8?

25 A. Yes.

1 **MR. BIGELOW:** Your Honor, I ask that Plaintiff
2 Exhibit 6 and Exhibit 8, which is an e-mail that Dr. Jara
3 sent to President Glenda Glover on Monday, February 5th,
4 2018, be admitted into evidence.

5 **MS. CARTER:** May we approach, Your Honor?

6 **THE COURT:** You may.

7 (WHEREUPON, a bench conference was had out of the
8 hearing of the jury, as follows:)

9 **MS. CARTER:** Okay. He's got the witness here. He
10 can ask him what he recalls. And if he needs the document to
11 refresh his memory, he can testify to that. I mean, he can
12 look at it. But, you know, this is hearsay in terms of the
13 document itself coming into evidence and, as we had talked
14 about, it's retaliation and the . . .

15 **THE COURT:** Okay. Response?

16 **MR. BIGELOW:** It's an e-mail that he wrote.

17 **THE COURT:** To?

18 **MR. BIGELOW:** To Dr. Glover.

19 **THE COURT:** Okay.

20 **MS. CARTER:** There is no foundation that
21 Dr. Glover received it. There is no --

22 **THE COURT:** Well, let's see. I mean, is the
23 objection authenticity or is it hearsay or both?

24 **MS. CARTER:** It's hearsay.

25 **THE COURT:** All right. Hearsay. I don't think we

1 have an authenticity, it sounds like. But what's the
2 response on the hearsay objection?

3 **MR. BIGELOW:** If -- I think that -- I don't
4 believe it's hearsay. I think if he wrote -- if he says, as
5 he did, that he wrote the document that he is sending, and he
6 sent it to President Glover, then it's his own writing, his
7 own what he did. And if nothing else, it goes to state of
8 mind, it goes -- I mean, there's --

9 **THE COURT:** Well, here's -- you know, we have to
10 peel back the analysis. First thing, is it hearsay? And the
11 fact that he wrote it doesn't change the fact, right, it's an
12 out-of-court statement. Out-of-court statement is not
13 hearsay. Before we even get to whether it's subject to an
14 exception, right, out-of-court statement is not hearsay
15 unless it's introduced for the truth of the matter asserted.

16 For what purpose is this document being offered?

17 **MR. BIGELOW:** To show that he complained.

18 **THE COURT:** Okay.

19 **MR. BIGELOW:** And to show what happened and what
20 he believed at the time.

21 **THE COURT:** Okay. Now, a couple of things. One,
22 it is to the extent his complaining to the university
23 president is a relevant fact, that is, a legitimate
24 non-hearsay purpose, absolutely. But there is always the
25 danger it can be taken for a hearsay purpose which, to me, is

1 where a limiting instruction comes in.

2 So let's take this one by one. Is the fact that
3 he complained, in your view, relevant? Seems to me it would
4 be.

5 **MS. CARTER:** Yes, but he can testify to that.
6 This is also the best evidence, one that he's here to
7 testify.

8 **THE COURT:** Is there -- okay. But listen, there
9 are two competing things here. One is it's, I think, very
10 legitimate for Mr. Bigelow to get out that he complained to
11 the university president. I don't think you dispute that.
12 But you're saying, well, why do we run -- essentially, you're
13 saying why do we run the risk of this being taken for the
14 truth of the matter asserted when we can, you know, avoid
15 that somehow.

16 Here's what I'm inclined to do. The first thing
17 is that, as regards the attachment, I think if the main
18 document, No. 6, comes in, you don't need No. 8 because No. 6
19 tells you what it is. Right? It's a list of incidents.

20 And there is a -- you know, I think the jury will
21 get the point. He complained about particular incidents. I
22 think that the danger of it being taken, even with a limiting
23 instruction, the attachment being taken for the hearsay
24 purpose of the out-of-court statements about what happened
25 are true, maybe does substantially outweigh the probative

1 value of actually attaching the attachment when the e-mail
2 tells you the nature of the attachment.

3 I do think that as regards this itself, this
4 e-mail itself, the purpose of it is to say, yeah, I
5 complained to the president herself. I don't know that him
6 testifying about it is as strong on this point as the e-mail
7 itself.

8 So what I'm going to do is admit this with a
9 limiting instruction, a very strong limiting instruction that
10 this is introduced to show that he complained about a series
11 of events that he purported to have happened. This is not
12 evidence of anything as to what actually happened. It's
13 being introduced to show that Mr. Patricio Jara made
14 complaints about alleged events, and this is not any proof at
15 all that the alleged incidents happened. All right?

16 **MS. CARTER:** Thank you.

17 **MR. BIGELOW:** Absolutely, Your Honor. And with
18 regards to 8, are you saying no 8?

19 **THE COURT:** I am saying no 8 under 403. I think
20 the potential prejudice in terms of being taken for an
21 improper hearsay purpose substantially outweighs the
22 probative value because the face of this e-mail itself tells
23 you, look, makes the valid point, I'm attaching a
24 chronological list of some of the incidents.

25 You, of course, can establish from the witness

1 stand and, you know, as far as I'm concerned, whatever you
2 want to do to get out the fact that those incidents in his
3 view occurred, you can ask him on the witness stand. But
4 introducing the list itself, I won't do.

5 But they're going to know that the complaint
6 included notification about alleged instances. They'll know
7 it from Plaintiff Exhibit 6.

8 **MR. BIGELOW:** I only ask this because I want to be
9 careful not overstepping bounds with the Court's 403. If I
10 ask him what he complained about, is that --

11 **THE COURT:** I think you --

12 **MR. BIGELOW:** -- or is that fair --

13 **THE COURT:** I think you can ask him what he
14 complained about. Yeah, I think that's right.

15 **MR. BIGELOW:** Without publishing to the jury. And
16 if I need to refresh his recollection saying, well, did
17 you --

18 **THE COURT:** You could refresh his recollection
19 with that document too.

20 **MS. CARTER:** Well, and I'm going to -- I want to
21 be careful here, Judge, because this is the double hearsay
22 document. There's hearsay within hearsay, so I don't want
23 him to blurt out when he's looking at this, --

24 **THE COURT:** Yeah.

25 **MS. CARTER:** -- Dr. So and So told me this or --

1 **MR. BIGELOW:** I'm not going to --

2 **THE COURT:** You'll make sure that if the document
3 is shown to him, that you give him the instructions, hey, I'm
4 going to hand this to you. Don't say anything about it, but
5 look at it. And after you're done looking at it, let me
6 know, and I'm going to ask you if your memory is refreshed.
7 That way, he'll know not to blurt anything out.

8 **MR. BIGELOW:** Perfect.

9 **THE COURT:** All right.

10 **MR. BIGELOW:** So we can say that 6 is admitted and
11 8 is not?

12 **THE COURT:** Exactly, yeah.

13 (WHEREUPON, the bench conference concluded, and
14 the following took place within the presence and hearing of
15 the jury:)

16 **THE COURT:** All right. So folks, Plaintiff's
17 Exhibit 8 will not be admitted. Plaintiff's Exhibit 6 will
18 be admitted, and you will see it momentarily.

19 But I'm going to give you one of those limiting
20 instructions that I had mentioned to you in my preliminary
21 instructions might be coming your way, which is I may tell
22 you that a document is admitted for a particular purpose and,
23 if so, should be considered for that purpose only and not
24 other purposes.

25 This Exhibit 6 is being admitted for a limited

1 purpose. The purpose is to show that the plaintiff made a
2 complaint to the university president. It's just to show the
3 fact of the complaint. It is important for you not to take
4 what the plaintiff wrote in this document, the -- any
5 assertions made in this e-mail as proof that the assertions
6 are true.

7 So in other words, it's one thing for an e-mail to
8 be introduced to show that he complained about incidents he
9 says happened. It's another thing to take that e-mail as
10 proof that those incidents actually happened. This document
11 is being admitted for the limited purpose of showing that he
12 complains about instances he said happened, not to be taken
13 as evidence that the incidents actually happened.

14 All right. So with that limiting instruction,
15 Exhibit 6 is admitted and may be published to the jury.

16 (Plaintiff Exhibit 6 was marked and admitted into
17 evidence.)

18 **MR. BIGELOW:** Your Honor, a bit of
19 semi-housekeeping if I may, and I apologize. There is --
20 there are two words, with permission of defense counsel, in
21 Plaintiff's Exhibit 6 that I would like to redact if that --
22 if there is no objection. And if I may approach the witness
23 and do just that, Your Honor, before I publish to the jury?

24 **THE COURT:** So do you want to show it to him
25 before you redact it? Or --

1 **MR. BIGELOW:** It's fine either way, Your Honor. I
2 don't think -- the opposing counsel -- may I approach, Your
3 Honor?

4 **THE COURT:** You may.

5 **MR. BIGELOW:** You know what I'm talking about,
6 right?

7 **MS. CARTER:** Yeah, exactly.

8 **THE COURT:** So two places you want to redact it
9 and then you'll publish?

10 **MR. BIGELOW:** Yes, Your Honor. May I approach the
11 witness, Your Honor?

12 **THE COURT:** Yes, sir.

13 **MR. BIGELOW:** Thank you.

14 (Respite.)

15 **THE COURT:** So in terms of housekeeping, what
16 we'll do, then, Mr. Bigelow: On a break maybe, let's make
17 sure we have an exhibit sticker that Ms. Jackson can use to
18 replace her unredacted version with your version right up
19 there as the original. Does that make sense?

20 **MR. BIGELOW:** Absolutely, Your Honor.

21 **THE COURT:** All right. Thank you.

22 **MR. BIGELOW:** So Exhibit 6 has already been
23 admitted into evidence, correct, Your Honor?

24 **THE COURT:** Yes.

25 **MR. BIGELOW:** Okay.

1 **BY MR. BIGELOW:**

2 Q. Dr. Jara, this, I have published to the jury what is
3 previously marked Exhibit 6. And you testified a moment ago
4 as to what this is. One of the things that you -- well,
5 actually, explain what you complained about in this.

6 A. I contacted her because, like I was saying, that there
7 were no action taken by TSU. So I told her that basically, I
8 have been subjected to discrimination and harassment, and
9 despite having human resources made clear to Interim Dean
10 Sharpe that he should accept the way I signed my document,
11 then he continued to not accept them. And --

12 Q. And in it you state that: "It was particularly harsh
13 for Interim Dean Sharpe to withheld my full November 2017
14 paycheck during 14 days." Is that correct?

15 **MS. CARTER:** Objection, Your Honor. Can we
16 approach?

17 **THE COURT:** Let me see if I can eliminate the need
18 for that. If not, you tell me.

19 Mr. Bigelow, you would agree that if Dr. Jara said
20 anything here about supposedly his paycheck being withheld,
21 that should not be taken as evidence by this jury that, in
22 fact, the paycheck was withheld, right? Do you see what I'm
23 saying? In other words, any language in here about the
24 paycheck being withheld is to be considered by the jury only
25 for the purpose of noting that he complained about this, not

1 that it's actually true that his paycheck was withheld.

2 **MR. BIGELOW:** That's correct.

3 **THE COURT:** Fair to say?

4 **MR. BIGELOW:** Yes.

5 **THE COURT:** Okay. All right. Let me ask the
6 question this way and see if this eliminates the objection.

7 Dr. Jara, I'm not asking you whether your paycheck
8 was withheld. Perhaps this will come up in later testimony.
9 But in this e-mail, did you say to the university president
10 that your paycheck had been withheld?

11 **THE WITNESS:** Yes, I did.

12 **THE COURT:** Okay.

13 All right. With that, how are we doing on your
14 objection? Does that resolve it?

15 **MS. CARTER:** That's good. Thank you.

16 **THE COURT:** All right. Thank you.

17 **BY MR. BIGELOW:**

18 Q. In August of 2018, did you file another complaint with
19 TSU?

20 A. I may have. I mean, I'm assuming that is correct, yes.

21 Q. Okay. If you would, just to refresh your recollection,
22 turn to Plaintiff's Exhibit 7.

23 A. Yes. August 22nd, I believe.

24 Q. Okay. And who did you make that complaint to?

25 A. The equal employment office at TSU.

1 **THE COURT:** One moment. If we're going to be
2 using that to refresh --

3 **MR. BIGELOW:** Yeah.

4 **BY MR. BIGELOW:**

5 Q. If you would, now, shut -- it's kind of awkward a
6 little bit. But now shut that exhibit, please. Just turn
7 away from that exhibit. And if you need help, I'll ask you
8 to do it again, to open it up.

9 What did you complain about in that letter?

10 A. Complained about a number of things. Among them was
11 the department chair position was conducted search, and that
12 I did not get the position despite being qualified.

13 I complained about the time sheets, that they continued
14 to happen. I complained about being given Monday afternoon
15 and evening courses.

16 Yeah. Complained about a number of things.

17 Q. Did you complain about the Oral English Proficiency
18 Screening Program?

19 A. Yes, I included the complaint about the Oral English
20 Proficiency Screening Program.

21 **THE COURT:** One moment, Mr. Bigelow.

22 Is this a good time to stop, Mr. Bigelow? If not
23 now, maybe in a couple of minutes?

24 **MR. BIGELOW:** Yeah, this is a fine time to stop,
25 Judge.

1 **THE COURT:** All right. So ladies and gentlemen,
2 folks, we will take our midafternoon break. We'll shoot to
3 start back up with the continued examination of Dr. Jara at
4 3:30. All right? So the jury may step down and we'll all
5 stay here while you step out.

6 (WHEREUPON, the jury was excused from the
7 courtroom, with matters being heard in open court as
8 follows:)

9 **THE COURT:** Thank you. Please be seated. All
10 right. Anything we need to discuss before we take about 15
11 minutes? Mr. Bigelow?

12 **MR. BIGELOW:** Not with me, Your Honor.

13 **THE COURT:** All right. Ms. Carter, Mr. Dalton?

14 **MS. CARTER:** No.

15 **MR. DALTON:** No, Your Honor.

16 **THE COURT:** All right. We'll see you in about 15.
17 Thank you.

18 (Recess 3:16 p.m. to 3:35 p.m.)

19 **THE COURT:** All right. Before the jury comes in,
20 I want to give some additional thoughts about my view about
21 this issue about these defense witnesses. And, you know, I
22 think Mr. Bigelow's complaint, you know, is -- you know, it's
23 spot-on. We can't have witnesses showing up who weren't
24 identified.

25 Now, I had stated my, you know, major concern

1 about this being brought up when it was, but sometimes I
2 think technical things actually matter. Sometimes we tend to
3 pooh-pooh them and just focus on substance.

4 The motion was styled as a motion in limine. By
5 definition, a motion in limine is a motion requesting an
6 evidentiary ruling before trial. And "limine" means at the
7 threshold, it's a request for an evidentiary ruling at the
8 threshold of trial rather than the movant having to wait at
9 trial to see whether an objection would be well-taken.
10 That's the nature of the motion that was filed here.

11 Now, as it happens, as a motion in limine, the
12 motion has effectively been denied based on the timing of the
13 ruling. And so here's what I think: Technically, the
14 motion in limine is denied.

15 Sixth Circuit case law is clear that objections
16 actually generally speaking, are -- even though -- let me
17 back up and say it this way: There's no question that
18 motions in limine can be well-taken by courts. They can have
19 a valuable function in helping folks prepare for trial and so
20 forth. There's no question, parties need to, in their own
21 view, file them, then so be it. But Sixth Circuit case law
22 is pretty clear. It's like, look, the general idea is that,
23 well, you know, we -- you know, we wait and see at trial when
24 evidence is offered, whether to sustain objections to it.

25 That is to say a motion in limine is never, ever

1 required to object to evidence, it's just not, and, you know,
2 absent some court order which may or may not be appropriate,
3 absolutely insisting that if an objection is made, it gets
4 made before trial.

5 That's the first point I want to make, and I'm
6 going to bring us around full circle on this in a minute.

7 The second thing is, my timing was a little bit
8 off. We had already established that Mr. Bigelow actually
9 could not have made a motion in limine on this as a practical
10 matter prior to the deadline because, you know, the deadline
11 of October 17th coincided with the deadline for the
12 disclosure of the witness list.

13 So in any event, even though I think he took
14 longer than would have been ideal to realize the problem, he
15 couldn't have met that deadline. And, in fact, it's even
16 clearer than that. October 17th was the deadline for
17 responding to motions in limine. October 10th was the
18 deadline for making them. We had already covered the point
19 that it wasn't that he's to blame for missing the
20 motion in limine deadline. It is to say that waiting two
21 weeks, you know, after discovering the problem is late for a
22 motion in limine.

23 And as a motion in limine, this was effectively
24 denied anyway, and that is technically going to be the
25 Court's ruling. But that's only a ruling on the request for

1 a motion in limine before trial.

2 There is no question that at trial, the defendant
3 calls these witnesses, Mr. Bigelow's going to jump up and
4 down at trial. Means after the "in limine" part, after the
5 "in limine" stage, at trial, he's going to jump up and down.
6 And that is the question. The defendant is free to brief
7 this as to why, when the objection is made again at trial, as
8 it will be, why the witnesses should be allowed to testify
9 when, as I understand it, they were never disclosed.

10 And so, you know, from Mr. Bigelow's perspective,
11 if he's really seeking an order in limine, he wants to move
12 quicker than that. But he is allowed to make the objection
13 even once trial starts. He's going to do that. There's no
14 question. His objection remains pending, and I do need to be
15 convinced why that objection is not well-taken. Defendant
16 has an option to file something before I make a final ruling.

17 All right.

18 **MR. BIGELOW:** Your Honor, a very small part of me
19 thought I would wait until trial and just do exactly what you
20 said, and I just figured that wasn't playing fair, frankly.
21 But just for what that is worth, which could be nothing,
22 but --

23 **THE COURT:** Yeah, and I -- and, you know, I kind
24 of thought that that could have been going through your head.
25 And it's this odd thing where sometimes motions in limine,

1 they're kind of at times preferred, but they're never
2 required, and now there's case law saying, well, gee, as a
3 general matter, motions in limine are hard to rule on because
4 the Court doesn't have a context in which the evidence is
5 offered.

6 You know, here, the grounds for keeping the
7 evidence out really is not dependent on what goes on at
8 trial. It's based on what happened before trial; another
9 reason why this would have been a good reason for a
10 motion in limine.

11 I do think, though, that the fact that it wasn't
12 made as a motion in limine does not waive the objection
13 because motions in limine are not required to object to
14 evidence. They are required if you want your ruling before
15 trial starts.

16 **MS. CARTER:** Your Honor, may I just ask for the
17 Court's clarification? To be clear, if these witnesses were
18 to be called at trial, solely for impeachment purposes, that
19 would be a different issue before this Court and with
20 opposing counsel, because --

21 **THE COURT:** I would tend to agree with that, that,
22 you know, the general idea being on a defense case in chief,
23 if the witness is called to provide extrinsic evidence to
24 impeach the plaintiff's witnesses called on case in chief,
25 that is something that was actually not required to be

1 disclosed. It can be in response to what comes out at trial.

2 Of course, if that's the rationale, the Court
3 would scrutinize that rationale closely if it found that for
4 other purposes, the witnesses couldn't be called. But it is
5 fair to call them for what is real impeachment purposes
6 despite their not being disclosed. I think that that's
7 accurate.

8 And I don't know if there's going to be any
9 impeachment. You're welcome to file anything you want on
10 that point. But as a general matter, you know, the way we do
11 trials, it's kind of a back and forth. A lot of things you
12 can, particularly in the civil context, you can script these
13 things up front, and that's what we try and do.

14 But I do think there's still enough of -- you
15 know, of trial being sort of a back-and-forth. And I mean
16 this only figuratively, and I'm serious when I make that
17 point: punch, counterpunch, right? That's what trial is.
18 And if someone's got otherwise admissible extrinsic evidence
19 that serves a legitimate impeachment purpose, to me, that can
20 be done on the fly, it can be offered on the fly. So that's
21 where I am on that point.

22 All right. Anything else of a preliminary matter
23 before we proceed with Dr. Jara, who may take the stand if he
24 likes?

25 **MR. BIGELOW:** Your Honor, and I'll write up on

1 this obviously, but as you might imagine, our position would
2 be that it's just a back end way to get around not putting
3 them on the witness list. And you could do that with
4 anything, and, of course, the question becomes, well,
5 impeachment of what?

6 **THE COURT:** Well, and I --

7 **MR. BIGELOW:** For what purpose?

8 **THE COURT:** And that's why I would want to
9 scrutinize it closely. Because, you know, impeachment, you
10 know, it's -- first of all, it has to be on a -- extrinsic
11 evidence to impeach has to be on a noncollateral matter. But
12 impeachment means not just sort of generally offering an
13 alternative version of the facts, right? It's a more narrow
14 notion than that. And I would scrutinize. And if this comes
15 up, and assuming that my initial thought, that these
16 witnesses would generally have to be excluded as defense
17 case in chief witnesses, if that view holds, I'm going to
18 want to hear up front the legitimate impeachment purposes
19 that do need to be more specific than kind of telling a
20 generally different narrative than what plaintiff witnesses
21 say.

22 So I agree with the concerns about sort of
23 backdoor. I'm going to want it to be real impeachment
24 evidence.

25 **MR. BIGELOW:** Because as you might imagine, Your

1 Honor, they're going to obviously testify or have some people
2 testify, well, discrimination didn't take place.

3 Well, I'm sure they would jump up and say whoa,
4 whoa, whoa if I said, well, I'm going to now bring in the
5 rest of Dr. Jara's department to our non- -- you know, who
6 are foreign-born professors and say, yes, discrimination,
7 it's impeaching them for saying no. I'm sure that would be a
8 huge issue, right?

9 **THE COURT:** Well, you know, I think a couple of
10 things. The testimony, it can't be, as I say, just too
11 general in sort of combating what the plaintiff witnesses
12 say. It's got to be more specific.

13 The other thing is, if it's offered for
14 impeachment purposes, I'm going to give a very strong
15 limiting instruction, and it's not to be taken as substantive
16 evidence. It is to be taken only as evidence suggestion that
17 what the plaintiff's witness said should not be believed.

18 So that's kind of where I am on it now. People
19 can file whatever they want on this issue. You know, real
20 impeachment evidence is welcome on the fly, even if not on a
21 witness list, but it does need to be real impeachment
22 evidence.

23 **MR. BIGELOW:** Thank you, Judge.

24 **MS. CARTER:** Thank you, Judge.

25 **THE COURT:** Yes, sir.

1 Ms. Carter, do you have anything further?

2 **MS. CARTER:** I do not. Thank you.

3 **THE COURT:** All right. Thank you.

4 So I'm thinking, Mr. Bigelow, that really, the one
5 that you've used to sort of publish to the jury, that really
6 should be the one for Ms. Jackson's stack. I know you had
7 raised the issue of switching it out.

8 **MR. BIGELOW:** Yes, Your Honor.

9 **THE COURT:** Yeah. But I think we need to go with
10 the one that was used just to be as accurate as possible.

11 Dr. Jara, you may come up and take the stand.

12 **THE WITNESS:** Thank you, Your Honor.

13 **THE COURT:** Yes, sir.

14 (The witness resumed the stand.)

15 **MR. BIGELOW:** Your Honor, may I just give that to
16 the Court, the one that I published? It has it blacked out
17 or whatever, redacted.

18 **THE COURT:** Yes. And I think if you give it to
19 her, she'll be happy just to put the appropriate exhibit
20 sticker and put it in the court stack, yes, sir.

21 **MR. BIGELOW:** Thank you, Judge.

22 **THE COURT:** Yes, sir.

23 (WHEREUPON, the jury re-entered the courtroom,
24 with matters being heard in open court as follows:)

25 **THE COURT:** All right. Thank you, folks, for your

1 continued attention. At this time, we'll proceed with the
2 examination of Dr. Jara.

3 **BY MR. BIGELOW:**

4 Q. Dr. Jara, to your knowledge, have you ever received a
5 response from President Glover regarding your complaint?

6 A. No.

7 Q. Dr. Jara, have you ever been -- failed to be paid on
8 time?

9 A. Yes, I have.

10 Q. What is your understanding as to why?

11 A. My understanding is that first, somebody didn't like my
12 signature or the way I signed the document the first time.
13 And the second time, it's even written that I printed my name
14 instead of using cursive. And I even got in between,
15 somehow, an e-mail from Interim Dean Sharpe explicitly
16 requiring me to have -- to sign with my name.

17 Q. Did anyone -- well, let me ask you a different
18 question.

19 Did you work the hours you were supposed to work to get
20 paid?

21 A. Yes, I did.

22 Q. Did you complain about this more than once to TSU?

23 A. I believe so, yes.

24 **MR. BIGELOW:** Your Honor, just a bit of
25 housekeeping, as we discussed before. Exhibit 6, which is

1 admitted into evidence already, I would like to hand to Julie
2 if that's possible and have her include it within --

3 **THE COURT:** All right. Why don't we have
4 Ms. Jackson take that, and you can put our exhibit sticker on
5 the back and mark it accordingly. Thank you.

6 **MR. BIGELOW:** Thank you very much. Appreciate it.

7 **COURTROOM DEPUTY:** Thank you.

8 **BY MR. BIGELOW:**

9 Q. Dr. Jara, did you file a compliant with the EEOC in
10 2018?

11 A. Yes, I did.

12 Q. Okay. I want to turn your attention in a minute to
13 this -- to an application to what's called a mini-grant. Do
14 you remember applying for a mini-grant?

15 A. Yes. I applied twice.

16 Q. Okay. And what was the difference between the first
17 time you applied and the second time?

18 A. In terms of the grant, there was no difference.

19 Q. Okay.

20 A. But when I was applying, there was no difference.

21 Q. Okay.

22 A. I had a colleague from another university, and we were
23 applying to this grant to start sort of like a mini-research
24 group with students, of course. And the money was entirely
25 for the students, to get them some funding so they could do

1 some research while doing this.

2 Q. Did you have to get a letter in support of that grant
3 from anyone?

4 A. Yes. I was supposed to -- part of the application
5 process needed a letter of recommendation which is something
6 that's standard that all grants require and administrators
7 usually provide as part of their duties, basically.

8 Q. And did you receive the letter the first time?

9 A. Yes. I received a letter from Dr. Lonnie Sharpe, the
10 interim dean of the college at the time.

11 Q. And did you receive a letter the second time?

12 A. No, I did not.

13 Q. Did you follow up as to why not?

14 A. After I didn't receive the letter?

15 Q. No. Did you -- I'm sorry. Did you ask to get the
16 letter the second time? I'm sorry. I should have asked
17 that. I apologize.

18 A. Yes. Yes, I asked. I sent an e-mail basically
19 forwarding the response from the previous year asking for the
20 same letter again and mentioning that, oh, what needed to be
21 done this time was just change the date basically.

22 Q. And that wasn't done, correct?

23 A. No, it was not.

24 Q. Okay. Was there a job opening at TSU in 2017 for the
25 position of chair of the department of math?

1 A. Yes, there was.

2 Q. And how did you learn about that position?

3 A. I had a graduate student in previous years -- well, we
4 had one of the grants, we supported some graduate students.
5 And then they were asking me if I had any, you know, way to
6 support them. I told them that at the time I didn't have
7 any, but I got him to the university where they publish all
8 the jobs basically, the openings. And then as I'm doing
9 that, by my surprise, I found out that there was an opening
10 for the chair position of the department.

11 Q. I'm going to ask you to turn to what has previously
12 been marked as Plaintiff's Exhibit 23. At the top of it, it
13 says "TSU Policy, Name of Policy, Assignment and Term of
14 Department Chair." Do you recognize that?

15 A. Yes, I do.

16 Q. And a few lines underneath, it says --

17 **THE COURT:** Why don't we, instead of getting into
18 what it says, you know, maybe --

19 **MR. BIGELOW:** I'm just establishing that it's
20 relevant before asking for it to be admitted, Your Honor. I
21 just wanted to make sure basically because I know what's
22 coming up.

23 **THE COURT:** Okay. All right. So if this can be
24 authenticated, do you anticipate a relevance objection?

25 **MS. CARTER:** If it can be authenticated. At this

1 time, I do not anticipate a relevancy objection.

2 **THE COURT:** Okay. All right. Let's -- okay.

3 Thank you. We'll do it this way: After taking a -- have you
4 been able to review this document? Are you familiar with it?

5 **THE WITNESS:** Yes, I am.

6 **THE COURT:** All right. Thank you. You can
7 inquire to authenticate.

8 **BY MR. BIGELOW:**

9 Q. And at the bottom of this document on each page, it
10 says "Faculty Handbook Appendix, page 6 of 1062, July 2nd,
11 2022," correct?

12 A. Yes, it does.

13 Q. And then in the following pages, it's different pages,
14 page 7 of 1000 and so on and so forth, correct?

15 A. Yes, it does.

16 **THE COURT:** So, Mr. Bigelow, were you referring
17 to -- going to refer to the adoption date to establish the
18 relevance in terms of time?

19 **MR. BIGELOW:** Yes, Your Honor.

20 **THE COURT:** Which is fair enough. Sounds like
21 there's no objection, though, on that basis.

22 **MS. CARTER:** Oh, there is an objection,
23 Your Honor.

24 **THE COURT:** Pardon?

25 **MS. CARTER:** Yes, there is an objection.

1 **THE COURT:** Oh, there is? Okay.

2 **MS. CARTER:** Yes.

3 **THE COURT:** All right. Is the objection that
4 we're not talking about a relevant time period?

5 **MS. CARTER:** Well, sort of.

6 **THE COURT:** All right. Why don't we approach on
7 this.

8 (WHEREUPON, a bench conference was had out of the
9 hearing of the jury, as follows:)

10 **THE COURT:** All right.

11 **MS. CARTER:** So if you look at the last page of
12 the exhibit, you see down here where it says revised,
13 revised, revised? Yep. So there is -- I know of at least
14 one that is closer in time to this one.

15 **THE COURT:** Okay.

16 **MS. CARTER:** And he doesn't -- he's not
17 established that this is the policy that was used during the
18 time for the '17, '18, '19. This says 2020 at the bottom, so
19 maybe they brought an old one back. But I know there is one
20 between these.

21 **MR. BIGELOW:** He is going to testify that it's his
22 understanding that at the time he applied, this policy was in
23 effect. That was his understanding. And if defendant wants
24 to bring up someone and says, no, it totally wasn't, it was
25 this other thing, they're certainly welcome to. It was such

1 and such. But he's going to testify this is what he believed
2 was in effect at the time.

3 **THE COURT:** So you would say that's sufficient for
4 the jury to find that this was the version in effect at the
5 time. And if it's sufficient for the jury to find, it
6 doesn't mean they should find or need to and that defendant
7 can assert that they shouldn't find that, but you're saying
8 it's sufficient evidence for the jury to find that this was
9 in effect at the time in question?

10 **MR. BIGELOW:** And that that was his belief. And
11 they're welcome to say your belief is wrong, what about this
12 document.

13 **THE COURT:** They can also cross-examine him on it.

14 **MR. BIGELOW:** All day.

15 **MS. CARTER:** Okay. But then we have a string of
16 testimony, if he is going to be asked about this document and
17 what it says, that could be in conflict and contrary to what
18 the actual policy for that time frame was.

19 **THE COURT:** Well, and I think if you could
20 persuade the jury of that, kind of dent the plaintiff's
21 credibility, so you would have a pretty good remedy if you
22 have some ammunition on that front, right? Do you see what
23 I'm saying? Well, Mr. Bigelow is kind of going out on a
24 limb, and if he's off base and makes a big deal about this
25 policy and you have a good argument that it's the wrong

1 policy, you know, then you've got a pretty good remedy in
2 front of the jury, right? Kind of destroy the credibility of
3 the plaintiff.

4 So I think that may go more to sort of responding
5 to the weight to be given this admitted document and maybe
6 disregarding the admitted document altogether on the grounds
7 that it's the wrong document.

8 **MS. CARTER:** But there's no --

9 **THE COURT:** Don't you think?

10 **MS. CARTER:** Well, maybe. There's no policy
11 number here. This is not -- it's not signed by anybody as
12 being approved. It's not an actual document of TSU.

13 **THE COURT:** Sounds to me, though, like it's going
14 to be a document that this witness will testify under oath
15 was -- you know, his belief is yes, testifying to my best
16 knowledge and recollection, this was the one in effect at the
17 time. Now, maybe he's right and maybe he's wrong, but he's
18 allowed to testify to that. And you're allowed to -- you
19 know, you're allowed to attack him any way you want.

20 But I do think generally, a witness's testimony,
21 hey, listen, as to this relevant document, yeah, I believe
22 that this is the one in effect. I suspect Mr. Bigelow will,
23 you know, ask him, well, why he believes that or the basis
24 for believing that.

25 **MS. CARTER:** We don't -- okay.

1 **THE COURT:** Right? I mean, if --

2 **MS. CARTER:** We don't know. I mean, it hasn't
3 been authenticated.

4 **THE COURT:** Well, that's what I'm saying, though.
5 He's allowed to try and authenticate it just based on the
6 testimony of the plaintiff who says that they have knowledge
7 of that, you know. And he's allowed to do that. You're
8 allowed to -- you know, you're allowed to challenge that. If
9 I find that it's been authenticated so a jury could believe
10 the testimony that this is the one in question, then it comes
11 into evidence.

12 And you're welcome to do all kinds of things on
13 your case in chief or otherwise to frankly make him look bad
14 if they're wrong.

15 **MS. CARTER:** Okay. Okay. And I'd also raise
16 foundation just because there's no --

17 **THE COURT:** Well, you can -- we'll allow him to
18 lay the foundation. When he offers it again, we'll take up
19 any objection. But I am saying, like, there's no requirement
20 that there be, you know, particular things on the document
21 itself. It's a more general requirement of -- authenticity
22 is a more general requirement than that. It can be satisfied
23 in numerous ways. Authenticity, even if acceptable for
24 purposes of admissibility, though, can certainly be
25 challenged in terms of weight to say well, may have come in

1 as being the document in place at that time, but we have
2 evidence showing that, in fact, it was not the document in
3 place at that time.

4 So we don't really have an objection on the table
5 now. But I think we can see what's coming. You can lay your
6 foundation and we'll go from there.

7 **IN UNISON:** Thank you.

8 **THE COURT:** Thank you.

9 (WHEREUPON, the bench conference concluded, and
10 the following took place within the presence and hearing of
11 the jury:)

12 **BY MR. BIGELOW:**

13 Q. Dr. Jara, to get back on track, you testified there was
14 a job opening in 2017 for the position of a chair of the math
15 department, correct?

16 A. Yes, I did.

17 Q. What was your understanding as to the policy and
18 procedure for finding a chair?

19 A. The university president had signed, the previous year,
20 a new policy for finding chairs across the university. This
21 was given to me by the then faculty senate chair, which the
22 university has a --

23 (Reporter clarification.)

24 **THE WITNESS:** The faculty senate chair, Michael
25 Catanzaro, C-A-T-A-N-Z-A-R-O -- because we had a meeting with

1 the president concerning the 2015 department chair election
2 in which Dr. Mirani won the votes, yet Dr. Jackson was
3 appointed to be the interim chair.

4 **BY MR. BIGELOW:**

5 Q. So what was your understanding at that time of what the
6 policy was specifically with regards to internal searches?

7 A. Well, the description of the policy, which is what I
8 have in front of me, is published in the faculty handbook.
9 That's the handbook for all faculty of the university. You
10 can find it online.

11 And my understanding is, it describes very clearly that
12 when looking for a department chair, first there must be an
13 internal search. And this internal search starts by
14 announcing to the faculty of the department that there is a
15 need to fill out this position. And in that way, they allow
16 faculty of the department to throw their name in the hat,
17 right?

18 And then it actually specifies how the chair of the
19 committee has to be elected which, in this case, is a member
20 of the college tenure promotion committee that does not
21 belong to the department, and then it describes the process
22 of the internal search that must be performed before one goes
23 to an external search.

24 Q. If you would, Dr. Jara, read over page 6 and 7. Just
25 kind of look over pages 6, 7, and 8.

1 A. Uh-huh.

2 THE COURT: Are you referring to the upper
3 right-hand number or the bottom left number?

4 MR. BIGELOW: I'm referring to -- thank you, Your
5 Honor -- the upper right-hand number.

6 THE WITNESS: Oh, okay. Thank you. Okay.

7 BY MR. BIGELOW:

8 Q. Just read that over if you would.

9 A. If it --

10 Q. No, not aloud, just to yourself. Just read it over,
11 please.

12 A. Okay. I'm sorry.

13 Q. That's okay.

14 A. (Witness complies.) Okay.

15 Q. Does that accurately reflect your understanding at that
16 time?

17 A. Yes, it does.

18 MR. BIGELOW: Your Honor, I ask that this be
19 admitted into evidence as Plaintiff's Exhibit 23.

20 THE COURT: All right. Objection or not?

21 MS. CARTER: We'll just put on the record our
22 objection regarding the authenticity of the document. And
23 then . . .

24 THE COURT: Okay. I hate to do this, but if
25 counsel could approach briefly.

1 (WHEREUPON, a bench conference was had out of the
2 hearing of the jury, as follows:)

3 **THE COURT:** I do think for now, I'm wondering
4 whether we got anything clear enough along the lines of, you
5 know, this was the document in effect at the time in question
6 and here's how I believe I know. Here's why I believe I
7 know. I don't think we got anything quite that specific, do
8 you? What do you think? I'm not sure I heard anything quite
9 like that.

10 It was more like he was kind of assuming it based
11 on it being put in front of his face -- I understand that --
12 that this must be the policy. Are you able to -- I'll
13 sustain the objection for now, but if you can sort of
14 inquire. Because there needs to be a basis for him, you
15 know, stating why he believed it was the one in effect at the
16 time in question beyond the --

17 **MR. BIGELOW:** Sure.

18 **THE COURT:** -- you know, the mere fact that you
19 put it in front of him.

20 **MR. BIGELOW:** Absolutely, Judge.

21 **THE COURT:** All right. Thank you.

22 (WHEREUPON, the bench conference concluded, and
23 the following took place within the presence and hearing of
24 the jury:)

25 ///

1 **BY MR. BIGELOW:**

2 Q. Dr. Jara, how did you get ahold of the Plaintiff's
3 Exhibit 23?

4 A. No. 23, the contents of --

5 Q. No, the actual policy itself.

6 A. Policy itself. You can download it. It's online.
7 It's a current faculty handbook.

8 Q. Did you -- do you know that this was the policy at the
9 time? Did you get it at that time?

10 A. Yes. The previous page to this has the signature of
11 the president and the vice president of academic affairs at
12 the time, Dr. Michael Hardy, the late Dr. Michael Hardy. So
13 that was signed --

14 Q. Are you confident that this is the policy that was in
15 effect at the time?

16 A. Yes.

17 Q. And how do you know --

18 **THE COURT:** And just to be clear, what time are we
19 talking about? Are we talking about a particular time in
20 2017?

21 **MR. BIGELOW:** In 2017, yes, Your Honor.

22 **BY MR. BIGELOW:**

23 Q. When the decision was made to put Dr. McMurray, hire
24 Dr. McMurray as the chair, was this policy in effect, in your
25 understanding?

1 A. Yes, it was.

2 **THE COURT:** How do you know that or why do you
3 believe that it's this particular version?

4 **THE WITNESS:** Because the previous page with the
5 signature of President Glover and the late Dr. Hardy states
6 that.

7 **BY MR. BIGELOW:**

8 Q. What previous page? I don't know what you're talking
9 about.

10 A. Page No. 5.

11 So there is a -- this is part of the appendix of the
12 faculty handbook, and basically in which they describe all
13 the documents after the faculty handbook with all the rules
14 are written.

15 So when you go back, then there is a page where it says
16 that the faculty senate, which has senators for all -- from
17 all the departments and colleges of the university approve
18 this hiring policy and then submit it to the president to see
19 if she will accept it or not. And then the president signs
20 that she's accepting it and the late vice president of
21 academic affairs sign it as well. And I believe that to be
22 in 2016.

23 Q. Do you believe that you saw this exact policy in 2017?

24 A. Yes, I did. Professor Catanzaro, the chair of the
25 faculty senate, e-mailed me a copy, the same person who

1 provided to the president, and say the president has signed
2 this. This is in place. So before you -- before the
3 department hires a new chair, this is the policy in place.
4 And this was before I even found out that the department was
5 actually looking for somebody.

6 Q. Okay.

7 MR. BIGELOW: Your Honor --

8 THE COURT: Are you offering it?

9 MR. BIGELOW: Yes, Your Honor.

10 THE COURT: All right. Is the objection being
11 made again?

12 MS. CARTER: Yes, it is, Your Honor.

13 THE COURT: All right. Based on this testimony
14 and also the fact that, you know, on its face, there is a
15 date that would indicate that it was treated as in effect in
16 July of 2020 -- not to say it was, but that's an
17 indication -- and that the adoption date was July of 2011,
18 that would bolster the testimony, which the Court does not
19 accept as true or untrue, but does say, for purposes of
20 admissibility, that this was in effect in between July of
21 2011 and July 2nd of 2020.

22 Therefore, there is a basis for accepting this as
23 the version in effect at the time in question, although the
24 defendant is free to dispute that however they want, but it
25 can be admitted on that theory.

1 **MR. BIGELOW:** Thank you, Your Honor.

2 **THE COURT:** Yes, sir. All right. So Exhibit 23
3 is admitted.

4 (Plaintiff Exhibit 23 was marked and admitted into
5 evidence.)

6 **THE COURT:** And I do want to instruct the jury:
7 The fact that I've admitted it as evidence of the policy in
8 effect at the time in question is not conclusive on that
9 question. If the defendant wants to argue or introduce
10 evidence suggesting that it wasn't in effect, they're free to
11 do so, but you are allowed to consider that, this document,
12 for what the plaintiff says it is, which is the version in
13 effect at the time in question. But whether it is the
14 version in effect at the time in question is a decision for
15 you and you alone.

16 All right. Mr. Bigelow, you may proceed.

17 **MR. BIGELOW:** Thank you, Your Honor.

18 **BY MR. BIGELOW:**

19 Q. Dr. Jara, if you would, please turn to Plaintiff
20 Exhibit 26.

21 A. (Witness complies.)

22 Q. Do you remember seeing this post?

23 A. Yes, I do.

24 Q. And do you remember seeing it in 2017?

25 A. Yes, I do.

1 Q. And is it a post for a position as the department head
2 of the physics and math department at Tennessee State
3 University?

4 A. Yes, it is.

5 **MR. BIGELOW:** Your Honor, I ask this be entered
6 into evidence as Plaintiff's Exhibit 26.

7 **THE COURT:** Any objection?

8 **MS. CARTER:** No objection at this time, Your
9 Honor.

10 **THE COURT:** All right. Thank you. Exhibit 26
11 will be admitted.

12 (Plaintiff Exhibit 26 was marked and admitted into
13 evidence.)

14 **THE COURT:** Dr. Jara, is it your understanding
15 that the idea of department head, which is what this document
16 refers to, is the same thing as a chair? Is that fair to
17 say?

18 **THE WITNESS:** Yes, it is.

19 **THE COURT:** Chair and a head are two different
20 objects, but when we're talking about the top person in the
21 department, they're the same thing; is that right?

22 **THE WITNESS:** Exactly.

23 **THE COURT:** All right.

24 **BY MR. BIGELOW:**

25 Q. Dr. Jara, I'm going to turn your attention -- try to

1 make this as easy as possible on the jury here -- to the top
2 of the page. This position says -- at least this document
3 says it was posted on the 5th of January 2017; is that
4 correct?

5 A. Yes, it is.

6 Q. And then it has a paragraph about job summary, correct?

7 A. That's correct.

8 Q. Okay. And this is an important document that I want to
9 go over with you kind of line by line, frankly.

10 And the job summary says: "The chair must be able to
11 provide strong leadership to promote a powerful vision for
12 the advancement of the department's mission and goals."

13 Do you believe that you're qualified to provide strong
14 leadership and promote that powerful vision?

15 A. Yes, I do.

16 Q. It says: "The department is seeking to increase its
17 stature and reputation nationally and internationally while
18 maintaining its culture of instructional excellence."

19 Do you see that?

20 A. Yes.

21 Q. Were you ready and qualified to increase the stature
22 and reputation nationally and internationally?

23 A. I was.

24 Q. In fact, you've traveled internationally, haven't you?

25 A. Yes, I have.

1 Q. As a professor?

2 A. No. As a graduate student.

3 Q. As a graduate student?

4 A. Yes.

5 Q. Okay. What do you do as a graduate student?

6 A. Well, I won an award, traveling award, at the end of my
7 studies; and it allowed me to spend around six months
8 traveling around Europe, visiting different universities that
9 I was invited to. So I went to give talks in the University
10 of Tübingen. I went to even talk in the University of Aalen,
11 I went to talk at the University of Karlsruhe. Those are all
12 universities in Germany. Then I went to the Delft Institute
13 of Technology; I gave a talk there as well.

14 I participated in a couple of seminars in Blaubeuren.
15 And then I went to Italy, and I participated in a seminar as
16 well. And I was invited by different departments to present
17 my research and my results of my dissertation before I
18 defended it.

19 Q. While we're talking about international travel -- and I
20 should have asked this, but it seems like something that it's
21 so obvious that it was nowhere in my preparation for this:
22 You are fluent in Spanish, correct?

23 A. Yes, I am.

24 Q. So you could teach a class in Spanish if you wanted to?

25 A. I have.

1 Q. Okay. I want to go to the second line or the third
2 line: "The chair will be responsible for working effectively
3 with the departmental faculty in an open and participatory
4 manner."

5 And it continues: "In collaboration with the
6 department faculty, the chair will oversee recruitment
7 efforts, assist in the development of curricula and new
8 programs including a graduate program, make recommendations
9 to the dean regarding all personnel matters, including the
10 evaluation of faculty and staff, and administer all
11 departmental budgets." Is that correct?

12 A. That's correct.

13 Q. I would turn your attention to this right here which
14 says "including a graduate program." Is that of particular
15 import to you, importance to you?

16 A. Absolutely. I was hired at TSU to actually increase
17 the number of the students in the graduate program,
18 especially because of the need of the state of Tennessee to
19 have more qualified teachers, because that's sort of common
20 knowledge that math teachers, you know, it's hard to find.

21 So unfortunately, during this process of department
22 chairs, the university decided to close the program. And at
23 the time, we had a -- the department had million-dollar
24 grants for students to support them; and at the same time,
25 during this period of time, I actually had the chance to

1 direct two graduate students' theses in which one of them
2 actually obtained a new result.

3 Q. Okay. After that, it states at the bottom of the job
4 summary: "This is a 12-month tenure track position with the
5 possibility of tenure upon appointment." Is that correct?

6 A. Yes, that's correct.

7 Q. Okay. Now --

8 **THE COURT:** Let me ask you -- jump in with a
9 question about that. You had talked about how there had been
10 a requirement to seek a candidate first internally to fill
11 the position of chair; is that right?

12 **THE WITNESS:** That's correct, Your Honor.

13 **THE COURT:** Now, for internal candidates to your
14 understanding, would they be really selected from only people
15 that already had tenure?

16 **THE WITNESS:** I am not 100 percent sure, Your
17 Honor, but if it is, it's described in the policy.

18 **THE COURT:** Okay, gotcha. Because it sounded like
19 someone was eligible for this job even without tenure, but
20 you already had tenure; is that correct?

21 **THE WITNESS:** Yes, I did.

22 **MR. GANT:** Okay. All right. Thank you.

23 **MR. BIGELOW:** And to your point, Your Honor, it
24 does say here, "with the possibility of tenure upon
25 appointment."

1 BY MR. BIGELOW:

2 Q. Is that -- it does say that, correct, Dr. Jara?

3 A. Yes, it does.

4 Q. Okay. Thank you. Sorry.

5 I want to hit on -- and this is really important. I
6 want to hit on the minimum qualifications. Okay? But before
7 I hit on it, when you applied for this position, what do you
8 submit to the committee?

9 A. I submitted the documents requires, which included a
10 cover letter; a CV; transcripts, I believe; a research
11 statement; and another statement like a vision, kind of.

12 Q. Okay, thank you. Here we go. Minimum qualifications
13 and experience, right here: "The successful candidate must
14 have an earned doctorate or the foreign equivalent or its
15 equivalent in training, ability, and/or experience in
16 mathematics or closely related field and have sufficient
17 experience and achievement to qualify for the rank of
18 professor."

19 You had that at that time, did you not?

20 A. Yes.

21 Q. Okay. So that's one of the qualifications, minimum
22 qualifications. It does say minimum qualifications, correct?

23 A. (Nodding head affirmatively.)

24 Q. What does that mean to you, minimum qualifications?

25 A. Means that every applicant who does not satisfy those

1 minimum qualifications shouldn't be considered.

2 Q. If the minimum qualification to be a U.S. District
3 Judge would be to have graduated from a law school, would you
4 have to have graduated from law school in order to be a U.S.
5 District Judge?

6 A. You should, yes.

7 Q. You should or you must?

8 A. You must.

9 Q. Okay.

10 A. Yes.

11 Q. Second: "The successful candidate will have a record
12 of scholarship and research that includes peer-reviewed
13 publications and securing external funding."

14 Did I read that correctly?

15 A. Yes, you did.

16 Q. So that's really two parts, though, isn't it, Dr. Jara?
17 It's record of scholarship and research that includes
18 peer review publications, correct? And then there's an
19 "and," right?

20 A. Yes.

21 Q. So the second thing you have to have: "Will have a
22 record of scholarship and research that includes
23 peer-reviewed publications." So that's the second minimal
24 qualification. And then: "And securing external funding,"
25 correct?

1 A. Correct.

2 THE COURT: Is the question whether he agrees that
3 those are the second and third --

4 BY MR. BIGELOW:

5 Q. Do you agree that those are the second and third
6 minimum qualifications?

7 A. I do.

8 Q. Okay. I want to focus on the third minimum
9 qualification. When it states "securing external funding,"
10 is that kind of a commonplace adjective for securing grants,
11 bringing in grants?

12 A. Yes.

13 Q. Okay. And you talked about the importance of grants
14 earlier, correct?

15 A. I think so, yes.

16 Q. It also states that "The candidate should provide
17 evidence of effective leadership experience, exceptional
18 communication and interpersonal skills, and ability to work
19 productively with faculty and students from diverse
20 backgrounds," correct?

21 A. Correct.

22 Q. Okay. Now, that last -- well, let me hit on each of
23 those actually. Let's take that one by one. "The candidate
24 should provide evidence of effective leadership experience."
25 Did you provide evidence of effective leadership experience?

1 A. Yes, I did.

2 Q. Okay. Did you provide exceptional communication,
3 evidence of exceptional communication and interpersonal
4 skills?

5 A. Well, my colleagues all knew me.

6 Q. No, but did you provide evidence to the --

7 A. Sure, yes.

8 Q. And also, did you provide evidence in your packet of an
9 ability to work productively with faculty and students from
10 diverse backgrounds?

11 A. Yes, I did.

12 Q. Okay. Now, again, these are minimum qualifications,
13 correct?

14 A. Yes, they are.

15 Q. Okay. On the third page, on the third page, it says:
16 "Please upload the following documents: résumé, cover letter,
17 philosophy statement, transcripts, and list of references."

18 Did you submit that?

19 A. Yes. I submit all of them.

20 Q. Okay. If you would, Dr. Jara, please turn to
21 Exhibit 29. And just to make it easier, also look at
22 Exhibit 30 as well. Dr. Jara, what is -- well, 29 is what
23 you submitted as your application for this position, correct?

24 A. Yes, that's correct.

25 Q. And that includes a cover letter, a philosophy

1 statement, and your CV, correct?

2 A. That's correct.

3 Q. And page 30 is your official transcript from LSU,
4 correct, Louisiana State University?

5 A. Yes.

6 **MR. BIGELOW:** Okay. Your Honor, I ask that these
7 be admitted as Plaintiff's Exhibit 29 and 30.

8 **THE COURT:** Any objection?

9 **MS. CARTER:** No objection.

10 **THE COURT:** All right. 29 and 30 will be
11 admitted.

12 (Plaintiff Exhibits 29 and 30 were marked and
13 admitted into evidence.)

14 **THE COURT:** I did want to ask one thing, Dr. Jara.

15 **THE WITNESS:** Yes, Your Honor.

16 **THE COURT:** Plaintiff's Exhibit 29, you say: "TBR
17 does not demand a full professor to serve as department
18 chair." Do you see that?

19 **THE WITNESS:** Yes, I do.

20 **THE COURT:** And "TBR" means what?

21 **THE WITNESS:** Tennessee Board of Regents.

22 **THE COURT:** Okay. And they are the ones that sort
23 of set the rules for Tennessee State University? Would that
24 be fair to say, to your understanding?

25 **THE WITNESS:** I believe it was at the time ever

1 since there was a change in the legislature; and now state
2 universities, each one of them have their own board. So I am
3 not sure about the timing but I -- if I wrote TBR, it
4 probably was because we were under TBR so, you know, at that
5 time.

6 **THE COURT:** Okay. Let me ask you this then: It
7 sounds like you had tenure but someone could actually fill
8 this job without having tenure; is that right?

9 **THE WITNESS:** Yes, that's right. But it's a --
10 the thing is that the tenure is given by the Tennessee Board
11 of Regents. So if you are not a professor from -- in a
12 university of Tennessee, then there is no way that you could
13 have had tenure.

14 Does that make sense?

15 **THE COURT:** Yes, uh-huh. And then what I was kind
16 of getting at was, did you view this as a promotion even
17 though you already had tenure?

18 **THE WITNESS:** Yes, indeed, because as it happened,
19 once that you get the position, then you not necessarily have
20 to be a full professor before, but as you take the position,
21 then you become a full professor. So you effectively move
22 from being an associate professor to an -- to a full
23 professor, as it actually happened with the candidate who was
24 given the position.

25 **THE COURT:** Okay. Thank you, Dr. Jara. I'll just

1 leave it there.

2 Mr. Bigelow, you may continue.

3 **BY MR. BIGELOW:**

4 Q. And if you get the position, you actually become a
5 chair of a department, correct?

6 A. Yes.

7 Q. Is that a pretty big deal?

8 A. Yes, it is.

9 Q. It's prestigious to be a chair of a department?

10 A. Yes.

11 Q. Okay. In your philosophy statement, at the very bottom
12 of it, you wrote that "I believe no matter the role that one
13 plays in university, one has to keep in mind that behind
14 every student, there is hope, and behind every faculty, there
15 is a person and perhaps a family."

16 What did you mean by that?

17 A. During this time at TSU, like I previously mentioned,
18 there was a department chair position being given to a
19 faculty member of the department who did not get the majority
20 of the votes. And --

21 Q. I just want to know what you mean by "behind every
22 student, there is hope." What do you mean by that?

23 A. Well, when you deal with college students, you -- you
24 have all kinds of college students. You have the college
25 student who actually somebody's paying for their education,

1 but you have some others that actually go to great lengths to
2 try to get their education.

3 So whenever you have a student, you have to think of
4 them, that yes, some of them may have no problem, but some of
5 them may be struggling.

6 Q. And are you helping provide hope for that person?

7 A. Of course. That's why you need to treat those students
8 accordingly. One of the hardest parts, for example, of
9 teaching a freshman course is to actually let them know that
10 this is -- that it's no longer free education. Even at a
11 state university, tuition is expensive. And no matter where
12 the money comes from, they are paying customers.

13 Q. I want to focus on your CV for a few moments, actually
14 more than a few moments because it's important.

15 **MR. BIGELOW:** Can the jury see that okay? Okay.

16 **BY MR. BIGELOW:**

17 Q. At the top, it says your name, Ph.D., correct?

18 A. Yes.

19 Q. And then underneath that, it states: "Education, Ph.D.
20 in Mathematics. Louisiana State University - USA (2008)."
21 Then it says: "Dissertation: Rational approximation schemes
22 for solutions of the abstract Cauchy problem and evolution
23 equations."

24 Did I read that correctly?

25 A. Yes, you did.

1 Q. It sounds complex. Is it complex?

2 A. Perhaps. That's a matter of opinion. I don't know.

3 Q. Okay. Fair enough.

4 Underneath that, it says you have your M.Sc. Was that
5 your master's?

6 A. Yes.

7 Q. In math from Louisiana State, and then another master's
8 degree from the University of Santiago, Chile, correct?

9 A. Yes.

10 Q. And you did a thesis at the University of Santiago; is
11 that correct?

12 A. Yes, I did.

13 Q. And that's spectral invariance of integral operations
14 in Lorentz spaces?

15 A. Close enough.

16 Q. Okay, I'll take it.

17 It talks about your research interests. Trying to do
18 your best in less than 30 seconds, could you tell the jury
19 kind of generally what some of those interests are about?

20 A. Sure. So I'm mainly focused on two big areas. One of
21 them is called functional analysis. So as you may recall
22 from algebra, you study functions, right, and then you go
23 into calculus and you study more functions; and then you go
24 to Calculus II, more functions; Calculus III, more functions;
25 differential equations, there's more functions. So this

1 keeps growing.

2 (Reporter clarification.)

3 **THE WITNESS:** I am sorry. I apologize. So where
4 were we?

5 **BY MR. BIGELOW:**

6 Q. There are lots of functions, and it gets more and more
7 difficult as you go higher.

8 A. So as you continue, the world of functions seems to be
9 it is a big deal in mathematics. So I study things that are
10 related to that work and their approximation. That's the
11 other side of the coin which is basically what we call the
12 Merigon analysis.

13 So just classical examples, what you see in the
14 weather, whenever they show you the projection of the
15 weather, that is a functional analysis together with a
16 Merigon analysis combined that produces this picture of how
17 the weather, how they predict the weather.

18 Q. Okay. Thank you.

19 A. Things like that.

20 Q. Thank you.

21 Under your academic employment section, it states that
22 you're a tenured professor, correct? Right there. I just
23 highlighted it. Yes?

24 A. Yes.

25 Q. And it also states that you are assigned to teach nine

1 credit hours per academic semester; is that correct?

2 A. That's correct. At LSU.

3 Q. Yeah. I want you -- I want to spend some time on your
4 funding awards. Now, when you say funding awards, to kind of
5 put things into place, in the minimum qualifications when it
6 says secured external funding, is this what it's talking
7 about?

8 A. Yes.

9 Q. Okay. So your funding awards, you noted five, correct?

10 A. Correct.

11 Q. Now, the first one -- first of all, what is a PI? It
12 says -- some of this says co-PI, sole PI, and all these kind
13 of things.

14 A. It's a technical term for principal investigator. So
15 basically you can submit a grant by yourself, which is very
16 rare to be awarded a grant by yourself. Usually you have a
17 group of people. And technically, you need to name one
18 principal investigator. And then they're called principal
19 investigators because of a technicality that somebody has to
20 be there. The PI that usually people calls it.

21 Q. So the first funding award was for -- that you noted
22 here was for \$297,000 and change, correct?

23 A. Correct.

24 Q. And the second one where you were the sole PI was for a
25 little over \$100,000, correct?

1 A. Correct.

2 Q. And the third one, was that -- the third one done at
3 TSU?

4 A. Yes, it was.

5 Q. Okay. Were the first -- the first one was done at TSU
6 as well, correct? It says right here, at Tennessee State
7 University?

8 A. Yes. All of them were at TSU.

9 Q. All of them were at TSU?

10 A. Yes.

11 Q. Okay. The third one was also TSU like you said, and
12 that was for \$424,834?

13 A. Yes, it was.

14 Q. Okay. And then you had a travel grant from the
15 Louisiana Education Quality Support Fund, correct?

16 A. Correct.

17 Q. Now, tell me about that. It says for visiting and then
18 it talks about a bunch of stuff. Tell the jury that, if you
19 will. Explain that.

20 A. That was what I was referring before, the travel that I
21 did over like a semester in which the university, the travel
22 grant actually paid for lodging, food, transportation,
23 airfare.

24 Q. Okay.

25 A. So it was -- it was very nice.

1 Q. And then it has a travel grant, second travel grant,
2 correct?

3 A. Yes.

4 Q. Now, if you total the first three things up, it's a
5 little over \$800,000, if my math is correct. Is my math
6 right, Professor?

7 A. Yes.

8 Q. Okay. And if you were to put a number on the
9 additional funding awards, the two travel grants, if you were
10 to combine all five, what would -- I'm not holding you to a
11 specific number. Around about what number would it be of
12 dollars?

13 A. 900 to a million.

14 Q. 900 to a million dollars?

15 A. Uh-huh.

16 Q. Okay. And this is what you submitted to the committee,
17 correct?

18 A. Yes.

19 Q. Okay. After that, after it talks about the securing
20 the external funding, it talks about publications, correct?

21 A. Correct.

22 Q. And when I say "it talks about," your CV addresses
23 publications, correct?

24 A. Correct.

25 Q. And it has a publication in a -- I guess it's a book or

1 a journal: *Neural, Parallel, and Scientific Computations*.

2 Is that a --

3 A. That's a --

4 Q. -- journal?

5 A. Yes.

6 Q. Okay. And then another one, *Rational Inversion of the*
7 *Laplace Transform*?

8 A. Yes.

9 Q. And then more, *Rational Approximation Schemes For*
10 *Solutions* for the Cauchy problem? You like Cauchy, I guess?

11 A. Yes.

12 Q. Is Cauchy a pretty big deal in the math world?

13 A. Cauchy is, yeah.

14 Q. Okay.

15 A. It's a problem that's been studied extensively and has
16 shown to be very, very difficult to crack it. That's why
17 there is a lot of publications on the subject and that's why
18 that one was in the proceedings of the American Mathematical
19 Society.

20 Q. And the next one is *Rational Approximation Schemes for*
21 *Bi-continuous Semigroups*?

22 A. Yes.

23 Q. And then you have another publication on the next page,
24 correct?

25 A. I believe so.

1 Q. Let me make it easier for people to see.

2 Rational approximation of schemes for this one. More
3 Cauchy.

4 A. That was my dissertation.

5 Q. Okay. And then you had two articles in preparation,
6 correct?

7 A. Yes, sir.

8 Q. And after that, you have a section called "Refereeing."
9 What is refereeing?

10 A. So as I explained before, one publishes, right, by
11 submitting to an editor. The editor picks professors around
12 the world and sends them the document and asks if you will
13 please review this. Obviously, they have to be experts in
14 the field. So refereeing means when you are actually the one
15 reviewing it.

16 So obviously, this is a -- it's not paid. Nobody gets
17 a penny. And you actually are not supposed to divulge
18 what -- what -- you can say what I have listed there, but not
19 about who was I reviewing.

20 Q. Okay. And you have a number of talks that you gave,
21 one to -- let's see, one, two, three, four, five, six, seven,
22 eight, nine different talks that you gave that you had
23 written down, correct?

24 A. Yes.

25 Q. And some of those talks were at TSU and some were in

1 Germany and some were at Louisiana State; is that correct?

2 A. Yes.

3 Q. And one was in Chile?

4 A. Yes. I believe so, yes.

5 Q. Second one from the bottom?

6 A. Yes.

7 Q. And then below that, you have a section called
8 "Teaching and Advising." And it notes that there were some
9 graduate students that you taught and advised as well as some
10 undergraduate students; is that correct?

11 A. Yes, that's correct.

12 Q. And when you advise and teach graduate students, is
13 that to help them gain, ideally, a master's or a Ph.D.?

14 A. Yeah, graduate student is -- yeah, either a master's or
15 a Ph.D.

16 Q. Okay. And what do you do when you advise undergraduate
17 students? What are they -- is it like senior thesis or
18 senior projects?

19 A. Yes. It used to be like that in our program. Now it's
20 no longer the case.

21 Q. Okay. And it's like a one-on-one? It's a one-on-one
22 thing when you're helping them out?

23 A. Yes.

24 Q. Okay. I'm not going to go into excruciating detail,
25 but the next portion talks about the courses you've taught at

1 TSU; LSU; Louisiana Resource Center for Educators; University
2 of Santiago, Chile; and Universidad de la Ciencias, de la
3 Informática en Chile, correct?

4 A. Yes.

5 Q. And at all of those places, did you ever have anyone
6 complain to you that they couldn't understand you?

7 A. No.

8 Q. Okay. At all the other places, did anyone ever not pay
9 you on time?

10 A. No. They always pay me on time.

11 Q. Okay. At all of those other places, did anyone ever
12 question a time sheet and your signature?

13 A. Actually, I've never had -- I didn't even know what a
14 time sheet was until interim chair -- I mean Interim Dean
15 Sharpe started demanding me to sign them. I wasn't even
16 aware that they existed.

17 Q. So the answer is no, though?

18 A. No.

19 Q. Okay. The next section talks about service. And this
20 is important, too, I think. It says Academic Year 2016-2017.
21 You're the academic audit committee chair; is that correct?

22 A. Yes, I was.

23 Q. And then you also were on the curriculum committee?

24 A. Yes, I was.

25 Q. And the year before, you were the academic productivity

1 review and post-approval monitor of the committee chair,
2 correct?

3 A. Yes, I was.

4 Q. And then you were on the curriculum committee again
5 that year?

6 A. Yes, I was.

7 Q. And the year before that, you were faculty advisory
8 committee to academic affairs, the graduate program committee
9 chair, and enhanced mathematics courses committee, correct?

10 A. Yes.

11 Q. As well as the chair of the technology committee?

12 A. Yes, I was.

13 Q. And it just goes on and on, and you were involved with
14 lots of committees and leadership positions; is that correct?

15 A. That's correct.

16 Q. Okay. And it talks -- the last thing it says, it talks
17 about your professional membership. And you're a member of
18 the American Mathematical Society; is that correct?

19 A. Yes.

20 Q. Okay. In your opinion, or actually just factually, I
21 suppose, did you meet the minimum requirements to be a chair?

22 A. Yes.

23 Q. Do you have any doubt about it?

24 A. No.

25 Q. Okay. Briefly, I want you to look or I'm going to turn

1 your attention to Plaintiff's Exhibit 30 which was already
2 entered into evidence. The jury will ultimately have this,
3 but approximately what was your GPA at LSU?

4 A. 3.84.

5 Q. 3 point what?

6 A. 3.84.

7 Q. 3.84?

8 A. Uh-huh.

9 Q. Are you ashamed that you, like, didn't get a 4.0? Was
10 that like -- did that hurt you?

11 A. No. I'm okay with it.

12 Q. Okay. Do you know who ultimately received the job that
13 you applied for?

14 A. I do.

15 Q. And who is that?

16 A. Dr. Nolan McMurray.

17 Q. And he's here today, correct?

18 A. Yes, he is.

19 Q. And he's sitting with defense counsel?

20 A. Yes, he is.

21 Q. And is he your boss now or was he your boss then or
22 both?

23 A. Both. Ever since -- ever since Interim Lonnie Sharpe
24 retired, Dr. Nolan McMurray was promoted to the -- be the
25 interim dean of the college.

1 Q. What's your understanding with regards of -- regards to
2 Dr. McMurray's application to become chair?

3 MS. CARTER: Objection.

4 MR. BIGELOW: He can testify as to his
5 understanding.

6 THE COURT: Well, the question being what's your
7 understanding. I'm going to sustain the objection and note
8 that you can establish a foundation for him having grounds
9 for an understanding.

10 BY MR. BIGELOW:

11 Q. Do you believe that Dr. McMurray met the minimal
12 qualifications required to be the chair?

13 MS. CARTER: Objection.

14 THE COURT: Yeah, again, no basis. I'm going to
15 sustain the objection. No basis for a belief has been shown.

16 Tell you what. Is this a good time to break for
17 the day? We can go a few more minutes if you like, but . . .

18 MR. BIGELOW: Could you just give me two more
19 minutes and then we can break?

20 THE COURT: Sure.

21 BY MR. BIGELOW:

22 Q. Okay. If you would, turn to page -- or turn to
23 Plaintiff's Exhibit 31, please, Doctor.

24 Do you know what Plaintiff's Exhibit 31 is?

25 A. It looks to be one of the statements of Dr. Nolan

1 McMurray.

2 Q. Okay. Do you -- do you have any knowledge as to
3 whether Dr. McMurray had any external funding prior to
4 applying to become the chair at TSU?

5 A. The CV provided did not show any external funding.

6 Q. Okay.

7 **MR. BIGELOW:** I think that's a good time to stop.

8 **THE COURT:** All right. Very well. Did you have
9 something, Ms. Carter?

10 **MS. CARTER:** No, Your Honor.

11 **THE COURT:** Okay. All right. Very well. So what
12 we'll do right now is allow the jurors to step down.

13 Please do recall what I stated earlier,
14 admonitions about not talking about this case with anyone
15 else including each other, even sort of family members and so
16 forth, not doing your own research or investigation or
17 anything like that.

18 You know, if you want to tell someone you had jury
19 service today, of course, that's fine, but anything about the
20 case, please don't be discussing.

21 We'd ask that you report to the jury assembly room
22 at 9:00 a.m. tomorrow morning.

23 And yes, did you have something?

24 **MS. CARTER:** Oh, no.

25 **THE COURT:** No, you're just stretching? All

1 right. That's legit. I just didn't want to miss anything.

2 And I did want to thank you again for your
3 continuing service. If you show up at the jury room at 9:00,
4 we'll be prepared to start and call you up right after that
5 and we'll go from there and continue with the examination of
6 Dr. Jara.

7 So the jurors may step down at this time. Thank
8 you.

9 (WHEREUPON, the jury was excused for the day, with
10 matters being heard in open court as follows:)

11 **THE COURT:** All right. Dr. Jara, you may step
12 down.

13 **THE WITNESS:** Thank you, Your Honor.

14 **THE COURT:** Yes, sir.

15 All right. So, you know, my intention is to have
16 a draft jury charge to submit to the parties tomorrow
17 morning, and maybe Thursday, we can -- Thursday morning, do
18 the jury charge. I wanted to -- yeah, please be seated.

19 I wanted to comment on something that I did there.
20 And really, to make clear, I wasn't putting my thumb on the
21 scale in favor of either side.

22 I was concerned or interested in the head of the
23 department. There was something on there -- and I think you
24 know what I'm referring to -- that might indicate that
25 actually it's, I don't know, more of an administrative

1 position, didn't -- not necessarily a promotion because it
2 had on there, right, this language, hey, it's a tenure track
3 position, possibility for obtaining tenure.

4 But Dr. Jara, already having tenure, it could be
5 taken by someone as saying, well, gee, I'm not so sure that
6 this is actually a promotion rather than some sort of
7 administrative position that sounds nice, but in substance
8 isn't as big a deal as having the tenure that Dr. Jara
9 already has and that apparently a department head might wish
10 to attain.

11 So I was interested in wondering whether there was
12 reason to believe it was a promotion. That's why I went the
13 direction I did.

14 Now, both sides with their proposed jury
15 instructions have assumed that this position would have been
16 a promotion. And before making that assumption, which the
17 parties made by really not requiring the jury to find that
18 failure to give the position was an adverse employment
19 action, but instead, their jury verdict forms assumed that
20 failure to grant this position was a failure to promote and
21 thus constituted an adverse employment action. In other
22 words, the parties have assumed this.

23 For the sake of defendant, I wanted to test that
24 assumption and see whether there was reason to believe that
25 this was, in fact, a promotion. That's why I went the

1 direction I did, to see whether the parties' assumption was
2 valid. Because if it wasn't, if there was no evidence to
3 support it, I don't know if I would have allowed any such
4 assumption to show up on a verdict form.

5 So if it sounded like I was firming up the
6 plaintiff's case on some point, that's not what I was doing,
7 and I wanted to be clear about that.

8 **MS. CARTER:** Your Honor, may I speak to that?

9 **THE COURT:** You may.

10 **MS. CARTER:** And, in fact, that will be a strong
11 strain in the defendant's case, that it is not a position of
12 promotion. That is the way it has been couched, but we don't
13 agree with that. So that will be -- you know, that's --

14 **THE COURT:** I think -- look, I think that that is
15 a fair argument to make, but I guess what I want to know,
16 though, is if that's the argument, could someone explain to
17 me why the proposed verdict form was -- particularly, I think
18 I called this issue to everyone's attention at the first
19 pretrial conference, right? Like, what is being assumed
20 about what's an adverse employment action versus what isn't?
21 That proposed jury instruction says to me the defendant is
22 saying we are going to ask the jury to assume that this is a
23 failure to promote.

24 That's the only way to read that jury proposal.
25 Am I missing something?

1 **MS. CARTER:** Well, and that may be on me, because
2 I looked at it in terms of wanting to understand if the jury
3 was going to find it as a failure to promote, given the
4 evidence it will be presented, and because it is what
5 plaintiff says supports the compensatory damages award, so I
6 wanted to make sure that we could break those two out.

7 **THE COURT:** I think it's important to break them
8 out. I had thought, and I'd be curious what other folks'
9 memory is, I sort of think that I had alluded to the notion,
10 you know, let's pay attention to whether we need to break out
11 separately whether something is an adverse employment action
12 versus being assumed.

13 Do you think I did that, Mr. Bigelow?

14 **MR. BIGELOW:** I think you did that, Your Honor,
15 yes. But I think you did say to break that down; I think we
16 tried to break it down. But I will say with all due respect
17 until now -- and I think you're alluding to this -- neither
18 party has brought up it anywhere, including, frankly, in the
19 defendant's motion for summary judgment, that this was
20 somehow not a promotion.

21 **THE COURT:** Yeah. And I'm --

22 **MR. BIGELOW:** This is the first time that I've
23 even heard that argument, Your Honor. And I know it came
24 from you, but it's the first time I've heard this argument.
25 And I'm glad my -- I don't look at it as helping my side out.

1 I know you said, well, maybe -- I actually looked at it
2 helping their side out because in theory, Dr. Jara could have
3 said, oh, interestingly enough, Judge, you know what? No.
4 This is --

5 **THE COURT:** Right, right.

6 **MR. BIGELOW:** -- not a fair -- and you would have
7 been like, well -- they would have jumped up and said, well,
8 kick this, there's no claim anymore. And I would have said,
9 well, you're right.

10 **THE COURT:** Exactly. And so that's why, you know,
11 on the one hand, the answers that were given tended to
12 support sort of plaintiff's position that this was a
13 promotion. But the risk was there, and that it could have
14 come out to indicate, well, you know what? It's not really a
15 promotion, in which case the signals I was getting from both
16 sides, for whatever reason, that this is a promotion, we're
17 going to assume it, I'd have qualms submitting it to the jury
18 under that assumption.

19 And I don't want the jury sort of confused about
20 that because, you know, I'm not claiming to be the brightest
21 bulb in the bush. That jumped out to me immediately: How do
22 I know it's a promotion. I mean, you don't even have to be a
23 tenured professor to get this. And this tenured professor is
24 complaining about getting a job -- that we haven't heard
25 about the salary yet, and maybe we could talk about how that

1 would be a jump in salary. But like, it would look for all
2 the world like maybe it's an administrative position, less
3 prestigious because you don't have to be an academic bigwig,
4 meaning a tenured professor to get it. And I don't want the
5 jury confused.

6 And so I really thought the parties have been
7 assuming this in part because of what you say, Mr. Bigelow.
8 I didn't see anyone ever claiming that the failure to -- or
9 the decision -- and I won't call it a failure; that implies
10 something wrong and I'm not saying that it's something wrong.
11 We don't know. That's what we're here to determine -- but
12 not giving him the position, I thought everyone was assuming
13 would be a failure to promote.

14 The question was whether the failure to promote
15 was based on national origin. I thought that's what the
16 dispute was about. And I don't know that the defendant is
17 prohibited from arguing it. I am saying that they've -- they
18 have indicated as recently as this very recent jury verdict
19 form that there's nothing for the jury to decide here. This
20 is a failure to promote. The question is whether it's
21 justified. There's the way I view it.

22 Yes, sir.

23 **MR. BIGELOW:** Again, Your Honor, prior to 10
24 minutes ago, I -- the defendant has never indicated that this
25 was an argument that they were ever going to make, let alone

1 could be made. So it's new to the plaintiff based on your
2 rationale, Judge.

3 **THE COURT:** All right. Thank you, Mr. Bigelow.

4 Yes, Ms. Carter?

5 **MS. CARTER:** So, Judge, I do not want to prejudice
6 my client. In light of Your Honor's comments, then perhaps I
7 should not agree to that on the verdict form.

8 **THE COURT:** Well --

9 **MS. CARTER:** Because it is our intent -- I mean,
10 that -- have many questions about that, you know, and we do
11 have witnesses about that. And it is an administrative
12 position, as I think even the chair guidelines suggest, that
13 were entered into evidence already by plaintiff's counsel.

14 **THE COURT:** What would the evidence show? Was
15 there going to be any evidence on, like, salary of this
16 position compared to the associate professor position?

17 **MR. BIGELOW:** Absolutely, Your Honor. I mean,
18 absolutely. We're going to get in with Dr. McMurray as to
19 how much money he made and how much money he makes versus how
20 much money my client makes.

21 **THE COURT:** What's the defendant's position? Is
22 that chair position subject to a higher salary than the
23 associate professor position?

24 **MS. CARTER:** That would be it depends. And I'm
25 not trying to be flippant with the Court.

1 **THE COURT:** No, I'm sure you're not.

2 **MS. CARTER:** But there -- as the guidelines say,
3 which will be the testimony, there is a stipend. Like, for
4 example, let's say for the interim chair that's there now:
5 The interim chair gets a stipend, a monthly stipend, just
6 like a permanent chair for three years would get. But that's
7 the appointment. It's for three years. And then they either
8 promote up or they go to, you know, a professor position,
9 et cetera.

10 So it is an administrative position, and they get
11 release time for that, you know, from their workload and
12 stuff. And so they negotiate -- whoever the chair is that
13 comes in, like a permanent chair for that three years,
14 negotiates a salary. And it depends on -- and we did speak
15 to this in the damages briefing that we did. A full
16 professor, you can negotiate for that. A -- an associate
17 professor is not a full professor. That's not a full
18 professor salary.

19 And it also, when you're the chair, you get a
20 thousand-dollar-a-month stipend for that position. But when
21 you are not the chair anymore, that thousand-dollar-a-month,
22 \$12,000, goes away. Like, if you just go back to teaching,
23 it goes away.

24 **THE COURT:** Does the defense have a view about
25 whether, in Mr. Jara's case, we know whether he would have

1 received more salary as the chair?

2 **MS. CARTER:** So he would have received -- if he
3 had been appointed the chair, he would have received the
4 \$12,000 -- you know, the thousand dollars a month stipend. I
5 agree with that.

6 **THE COURT:** Okay.

7 **MS. CARTER:** And I would not -- I mean, I think
8 that's what the policy says when they -- you know, when
9 somebody takes that position.

10 In terms of the 12-month appointment versus -- and
11 it's 12-month appointment versus nine-month faculty salary,
12 there -- that's not a true comparison, right? Because you're
13 working for 12 months, and you're getting a 12-month salary.
14 When you're working for nine months, you get a nine-month
15 salary, and so they're -- it's not comparable.

16 **THE COURT:** Nine months, working nine months for
17 nine months' pay?

18 **MS. CARTER:** Correct.

19 **THE COURT:** As opposed to working 12 months for 12
20 months' pay?

21 **MS. CARTER:** Correct.

22 **THE COURT:** All right.

23 **MS. CARTER:** So yes, I mean -- so I don't want to
24 prejudice my client because I was trying to understand or
25 provide the jury with something where I could understand if

1 they were going to give back pay, where that was going.

2 **THE COURT:** Sure. And I do understand that.

3 But, you know, I really -- you know, I thought I
4 had raised sort of this issue. Hey, you know, you know,
5 let's be thoughtful about whether the jury needs to decide
6 whether something is an adverse employment action versus
7 well, it is, but if -- even if we break out adverse
8 employment action separately, we can just assume that
9 something is an adverse employment action and not have them
10 decide that it is. You know, I thought I had done that.

11 You know, I -- I don't know that it's too late for
12 the defendant to argue that at this point. Mr. Bigelow may
13 see it differently for whatever reason. I do think -- the
14 only way to put it is this: I see all kinds of cases.
15 There's nothing like employment discrimination trials for
16 confusion purposes. They are just the way the law is, maybe
17 be even worse at summary judgment stage.

18 But part of the confusion is setting aside how
19 everything works at the summary judgment stage and doing it
20 how it needs to be done at the trial stage, but at the trial
21 stage, there are a lot of pitfalls. So I've been working
22 hard to try and keep us focused in the jury instructions and
23 verdict form and otherwise on what's really an issue and what
24 isn't. It seems to be sort of a shifting landscape, and it's
25 causing some, I think, some problems.

1 Mr. Bigelow, all right, what -- anything you want
2 to say on this for the time being?

3 **MR. BIGELOW:** No, Your Honor, other than, you
4 know, as I stated to the Court before, defendant didn't have
5 this take during a motion for summary judgment that was
6 filed, you know, almost a couple years ago by now, nor did
7 they have it, frankly, this morning during their opening
8 argument. Granted it's just opening argument, I get it.

9 **THE COURT:** Sure.

10 **MR. BIGELOW:** That doesn't mean they couldn't --
11 you know. With that said, frankly, I hadn't thought about
12 failure to interview until we were talking about it in court,
13 and I raised it. Admittedly, I lost, but I raised it, so it
14 goes.

15 **THE COURT:** Well, these things do happen. I would
16 say this, you know. There's been a lot of discussion about
17 how a jury verdict form should look, and whatever my proposal
18 is, I'm going to be thinking about it and acting on it. It's
19 going to take account on the need to just be clear about what
20 we're asking the jury to decide; how it may be helpful in
21 keeping an award of back pay separate from an award of
22 compensatory damages if liability is found; making sure we
23 don't assume things in a jury verdict form that one side or
24 the other says we can't assume in terms of the element. All
25 these things gotta go into the mix.

1 I will say this, Mr. Bigelow: You know, like I
2 say, I just -- I was really concerned someone could read that
3 as saying, you know, if the issue had not been raised, just
4 major confusion to the jury, like, this doesn't look like a
5 promotion. And particularly depending on how the financial
6 information would have come out at trial, it looks like
7 someone with a lower rank, nontenured person, could get the
8 position.

9 So I did want to raise it. And in light of
10 what -- you know, what the defense is saying, and assuming
11 they're allowed to raise this defense, you know, I think
12 it's -- right now, where I'm coming from is the defendant can
13 make that argument, fair enough, and you are free to continue
14 your inquiry to try and make your case that whatever
15 promotion is, this is it.

16 Or, if you want to scrap failure to promote from
17 my view and say forget about that, maybe we can tie it
18 directly to a denial of a pay increase if you want. Whatever
19 it is, I think the issue is teed up for the jury because they
20 may wonder how this is adverse not to get this when it could
21 be taken from that job description as being slightly less
22 than a tenured faculty position.

23 **MR. BIGELOW:** I am -- not that it matters what I
24 think, but I am absolutely fine with defendant making that
25 argument.

1 **THE COURT:** Okay.

2 **MR. BIGELOW:** My client makes \$65,000 a year.

3 Does not control what he teaches or doesn't teach, doesn't
4 get enough chance to do grants and opportunity to do any
5 grants, where I believe Dr. McMurray makes a little over 100
6 grand, if not significantly more over 100 grand, and has a
7 whole bunch of fringe benefits allowed to his job, and I
8 invite them to make that argument.

9 **THE COURT:** All right. Any final thoughts in
10 light of all this back and forth? There's going to be
11 grounds for folks to argue all kinds of things. Jury verdict
12 form, should it be general as between just the dichotomy
13 between general discrimination versus hostile work
14 environment, or do we want to break out adverse employment
15 actions?

16 Because, you know, parties' views on adverse
17 employment actions could still be shifting. I just -- you
18 know, I -- I don't want to send the wrong message as to what
19 the parties' views even are in a jury verdict form.

20 **MR. BIGELOW:** The defendant started with the
21 broken out and I agreed with the Court and that's why I
22 submitted -- submitted what we did. I think that's
23 appropriate for all the reasons that this Court noted a few
24 days ago. I think it makes a tremendous amount of sense.
25 And it also frankly breaks that down versus the world of just

1 hostile work environment, which is an appropriate thing.

2 **THE COURT:** All right. What I'll do, if the
3 defendant is still inclined to do that, I'm going to try and
4 draft a form that, you know, pegs what I think are the right
5 adverse employment actions being asserted and doesn't build
6 in any assumptions that shouldn't be built in because one
7 side or the other isn't assuming them.

8 So that's what the jury verdict form is going to
9 do, and the proposed jury instructions that I put out there
10 will probably reflect that as well.

11 All right. Anything else we need to discuss
12 before we reconvene? And I would suggest tomorrow at 8:30 to
13 discuss, you know, where the Court landed overnight on these
14 issues.

15 Mr. Bigelow, anything further?

16 **MR. BIGELOW:** Nothing from me, Your Honor.

17 **THE COURT:** Thank you. Ms. Carter or Mr. Dalton?

18 **MS. CARTER:** Nothing further.

19 **THE COURT:** No? All right. Then we'll see you
20 folks at 8:30.

21 Thank you. We stand in recess.

22 **IN UNISON:** Thank you.

23 (WHEREUPON, the foregoing proceedings were
24 adjourned for the day at 5:11 p.m., to be resumed November 2,
25 2022, at 8:30 a.m.)

1 REPORTER'S CERTIFICATE

2
3 I, Deborah K. Watson, Official Court Reporter for
4 the United States District Court for the Middle District of
5 Tennessee, with offices at Nashville, do hereby certify:

6 That I reported on the Stenograph machine the
7 proceedings held in open court on November 1, 2022, in the
8 matter of PATRICIO JARA vs. TENNESSEE STATE UNIVERSITY, Case
9 No. 3:20-cv-00131; that said proceedings in connection with
10 the hearing were reduced to typewritten form by me; and that
11 the foregoing transcript (Trial Volume I-B of IV, pages 1
12 through 172) is a true and accurate record of said
13 proceedings.

14 This the 12th day of February, 2023.

15
16 /s/ Deborah K. Watson
17 DEBORAH K. WATSON, RPR, CRR
18 Official Court Reporter
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